# Supreme Court of the United States.

## OCTOBER TERM, 1900.

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*No.* , *Original.*

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*EX PARTE:* IN THE MATTER OF THE PETITION OF THE WILDER'S STEAMSHIP COMPANY FOR WRIT OF MANDAMUS

*vs.*

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLES WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, JUDGES THEREOF, RESPONDENTS.

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*To the Honorable the Supreme Court of the United States:*

The petition of The Wilder's Steamship Company, a corporation organized and existing under the laws of the Territory of Hawaii, respectfully shows to this honorable court:

1. That it is the owner of steamships and vessels operating in the waters adjacent to the Hawaiian islands.

2. That on the night of the 27th day of December, A. D. 1899, the steamer "*Claudine*," one of petitioner's steamships,

collided with the barkentine "*William Carson*," claimed to be owned, together with the cargo therein, by George U. Hind, C. A. Spreckels, Rudolph Spreckels, G. Wempe, William Carson, H. D. Bendixen, James H. Nelson, M. O. Siverson, F. O. Johansen, George A. Nelson, N. J. McLeod, G. M. Fagerlund, J. S. Hellingsen, John Piltz, and Henry M. Wetherbee.

3. That thereafter, on the 5th day of February, A. D. 1900, said persons, as owners of the said barkentine and cargo, filed their libel in admiralty against your petitioner in the circuit court of the first judicial circuit of the Republic of Hawaii, claiming damages in the sum of $64,000.

4. That while said cause was pending in said circuit court of the first judicial circuit of the Republic of Hawaii, viz., on April 30, 1900, a certain act of the Congress of the United States was passed and approved, entitled "An act to provide a government for the Territory of Hawaii," and said act by the terms thereof took effect forty-five days from and after the approval thereof, viz., on June 15, 1900.

5. That thereafter, after the passage of said act of Congress, but before it took effect, said cause came on regularly to be heard, and on the 7th day of May, A. D. 1900, a decree was rendered in said cause against your petitioner in the sum of $55,000, said decree being as follows, viz:

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT, HAWAIIAN ISLANDS, ISLAND OF OAHU.

GEORGE U. HIND, C. A. SPRECKELS, RUDOLPH SPRECKELS, G. WEMPE, WILLIAM CARSON, H. D. BENDIXEN, JAMES H. NELSON, M. O. SIVERSON, N. J. McLEOD, G. M. FAGERLUND, J. S. HELLIGEN, JOHN PILTZ, and HENRY M. WETHERBEE

vs.

WILDER'S STEAMSHIP COMPANY (a Corporation).

*Decree.*

The above-entitled cause having come on to be heard in the regular course upon the calendar of this court on the 9th day of April, A. D. 1900, before the Hon. R. D. Silliman, acting circuit judge, and documentary and other evidence having been adduced at the trial of said cause by the libelants and libelee respectively, after hearing the argument by counsel for the respective parties, and due deliberation having been had, and the court having rendered and filed its opinion herein:

Now, upon motion of Paul Neumann, proctor for the libelants, it is considered, ordered, and adjudged that the loss of the barkentine "*William Carson*" was caused by the collision between the steamship "*Claudine*" and said barkentine "*William Carson*," and that said loss was occasioned without fault, privity, or knowledge of the libelants.

That the respondent, Wilder's Steamship Company, is the owner of the said steamship "*Claudine*."

That said loss and disaster occasioned by said collision on the 27th day of December, A. D. 1899, which resulted in the total loss of the said barkentine "*William Carson*," occurred without any fault or negligence on the part of those in charge of the said barkentine "*William Carson*," and that the value of said barkentine at the time of the loss was $55,000.

It is therefore ordered, adjudged, and decreed that Geo. U. Hind, C. A. Spreckels, Rudolph Spreckels, G. Wempe, William Carson, H. D. Bendixen, Jas. H. Nelson, M. O. Siverson, F. O. Johansen, Geo. A. Nelson, N. J. McLeod, G. M. Fageriund, J. S. Helligen, John Piltz, and Henry M. Wetherbee, the libelants herein, have and recover of the respondent, Wilder's Steamship Company, the sum of $55,000 and their costs and disbursements in this action incurred and taxed by the clerk of this court at $657.60, and that execution issue to enforce the satisfaction of this decree.

Dated at Honolulu, May 7th, A. D. 1900.

(Signed) GEO. A. DAVIS,
*Acting First Circuit Judge of the First Judicial Circuit.*

Approved as to form.
K., B. & Mc.

From which decree your petitioner made and perfected its appeal to the supreme court of the Republic of Hawaii, as provided by the then existing law of said Republic.

6. That section 10 of said act of Congress provides, so far as it relates to this matter, as follows, viz:

"SEC. 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed. * * * All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii." * * *

7. That thereafter said cause on appeal came on regularly to be heard before the supreme court of the Territory of Hawaii, and on the 25th day of October, A. D. 1900, said supreme court rendered its decision in said cause, awarding damages against your petitioner in the sum of $54,630.75.

8. That in accordance with said decision a final decree of said supreme court was made and entered on the 9th day of November, A. D. 1900, said decree being as follows, viz:

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII, SEPTEMBER TERM, 1900.

GEO. U. HIND, C. A. SPRECKELS, RUDOLPH SPRECKLES, G. WEMPE, WM. CARSON, H. D. BENDIXEN, JAS. H. NELSON, M. O. SIVERSEN, F. O. JOHANSEN, GEO. A. NELSON, N. J. MCLEOD, G. M. FAGERLUND, J. S. HELLINGSEN, JOHN PILTZ, and HENRY M. WETHERBEE, *Libelants and Appellees*,

*vs.*

WILDER'S STEAMSHIP COMPANY (a Corporation), *Libelee and Appellant.*

*Decree.*

This cause, an action for damages through collision between the steamship "*Claudine*," owned by the appellant, and the barkentine "*William Carson*," owned by the appellees, having come on for hearing on appeal before this court in its regular order upon the calendar:

Now, after said hearing and upon due consideration of all the matters involved in said appeal—

It is ordered, adjudged, and decreed that the judgment, order, and decree of the circuit judge of the first circuit, sitting in admiralty in this cause, be, and the same is hereby, approved and affirmed.

That the libelants Geo. U. Hind, C. A. Spreckels, Rudolph Spreckels, G. Wempe, Wm. Carson, H. D. Ben-

dixen, Jas. H. Nelson, M. O. Siversen, J. O. Johansen, Geo. A. Nelson, N. J. McLeod, G. M. Fagerlund, J. S. Hellingsen, John Piltz, and Henry M. Wetherbee have and recover from the libelee, Wilder's Steamship Company, the sum of fifty-five thousand dollars in lawful money of the United States, with interest thereon at the rate of six per centum per annum, and their costs and disbursements in said action incurred, taxed at $623.60; that from said judgment be deducted the sum of five hundred and fifty dollars, realized from the sale of the wreck of the "*William Carson*," less the amount of the costs of the said sale, taxed by the clerk at the sum of $180.75, making the total of said deduction the sum of $369.25, and the total amount of the judgment awarded the sum of $54,630.75, with interest, as aforesaid, from May 1st, A. D. 1900, and the sum of $623.60 costs.

(Signed) W. F. FREAR.
(Signed) A. PERRY.

9. That thereafter, to wit, on November 9, 1900, your petitioner herein gave due notice of its intention to appeal said cause to the United States circuit court of appeals for the ninth circuit, and upon the same day duly filed its notice of appeal and petition of appeal and assignment of errors.

10. That thereafter, to wit, on November 10, 1900, your petitioner, having received from the clerk of the supreme court of the Territory of Hawaii a certificate to the effect that the assignment of errors and petition of appeal had been duly filed, moved the said court to fix the amount of bond to stay execution, pending appeal in said cause; which motion, having been duly filed and presented to the said supreme court of the Territory of Hawaii, said court, on November 11, 1900, refused to grant.

11. That thereafter, to wit, on November 12, 1900, your petitioner, by its attorneys, Kinney, Ballou & McClanahan, procured from Paul Neumann, proctor for libelants in said cause, a stipulation as to bond, and thereafter, in accordance with said stipulation, a bond staying execution was executed by your petitioner; and thereafter, on November 30, 1900, your petitioner filed in the office of the clerk of the said United States circuit court of appeals for the ninth circuit said stipulation and bond, together with its petition for allowance of appeal in said cause to said court, and a certified copy of said petition, stipulation, and bond, under the seal of said court, is attached hereto and made a part hereof and marked Exhibit A.

12. That thereafter your petitioner by its attorneys presented said stipulation and bond and petition for appeal to the said United States Circuit Court of Appeals for the Ninth Circuit and moved for allowance of an appeal to said Court and for the approval of bond on appeal, whereupon on, to wit, April 1, 1901, said Court denied said motion, holding that it was without jurisdiction to entertain said appeal and on the same day entered an order to that effect. And a copy of said order, together with the opinion of the Court, all duly certified under the seal of said Court, is hereto attached and made a part hereof and marked Exhibit B.

13. That section 15 of the Act of Congress approved March 3, 1891, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," provides in part as follows, viz:

"SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those

provided for in the preceding section of this act, unless otherwise provided by law,

"And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases."

14. That section 15 of said Act of March 3, 1891, provides as follows:

"SEC. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

And your petitioner is informed and believes that shortly after the passage of said Act, to wit, on May 11, 1891, this Honorable Court did assign to appropriate judicial circuits the several Territories of the United States then existing, but that the Territory of Hawaii, not being then in existence, was not included in said assignment nor has it yet been so assigned.

15. That section 1891 of the Revised Statutes of the United States provides as follows:

"SEC. 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

16. That section 5 of said Act of April 30, 1900, organizing the Territory of Hawaii provides as follows:

"SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: Provided, That sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the Territory of Hawaii."

17. That by section 6 of said Act approved April 30, 1900, it is provided that the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force subject to repeal or amendment by the Legislature of Hawaii or the Congress of the United States; and that by section 7 of said Act said laws of Hawaii so far as they relate to maritime matters were repealed.

18. That your petitioner, therefore, claims that after said Act approved April 30, 1900, became effective, whatever jurisdiction in admiralty was exercised by the Supreme Court of the Territory of Hawaii was the admiralty jurisdiction of the United States and that, inasmuch as said jurisdiction is within the express terms of said sections 6 and 15 of said Act of March 3, 1891, your petitioner had a right to take its appeal from the final decree of said Supreme Court of the Territory of Hawaii to a Circuit Court of Appeals of the United States, and that the fact that said Territory has not yet been formally assigned to one of the judicial circuits of the United States does not impair or destroy the right of your petitioner in the premises.

19. That section 86 of said Act, approved April 30, 1900, is as follows, viz:

"SEC. 86. That there shall be established in said Territory a district court to consist of one judge, who shall reside

therein and be called the district judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said district, and said judge, attorney, and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

And your petitioner avers that by said Act all jurisdiction in admiralty was taken away from the other courts of the Territory of Hawaii and lodged in the district court provided for in said section, and that therein provision was made for appeals in admiralty causes to said United States Court of Appeals for the Ninth Circuit, but that your petitioner is not advised that said district court took jurisdiction of admiralty causes pending at the date when said Act became effective, in view of the provisions of section 10 of said Act hereinbefore set out.

20. Your petitioner further avers that there is, as it is advised by its counsel and as it verily believes, substantial error in the proceedings in said cause and in the decree rendered therein in said Circuit Court of the First Judicial Circuit of the Republic of Hawaii, and also in the decision of said Supreme Court of the Territory of Hawaii affirming said decree, and also in the opinion and order of said United States Circuit Court of Appeals for the Ninth Circuit, denying said petition and motion for allowance of appeal, whereby the substantial rights of your petitioner as appellant therein were and are materially and adversely affected, and if said decree is permitted to become final, as against your petitioner, and as appellant therein, an irreparable injury and injustice will be done to your petitioner; and your petitioner further states that it is entirely without remedy in the premises unless it is conferred by the interposition of this Honorable Court. Nor is this application either for annoyance or delay, but that petitioner's rights may be protected, errors in said cause by said above-named courts corrected, and justice done your petitioner in the premises. That the amount in controversy in said cause is largely in excess of five thousand dollars, exclusive of costs.

21. That owing to the refusal of said United States Circuit Court of Appeals for the Ninth Circuit to take jurisdiction of said cause your petitioner is exposed to great danger of irreparable loss and injury, inasmuch as proceedings in execution of said final decree of said Supreme Court of the Territory of Hawaii are only restrained by the stipulation and bond hereinbefore referred to, upon which said Circuit Court of Appeals has refused to allow an appeal; which danger can only be averted by a stay of proceedings ordered by this Honorable Court pending its consideration of the matters herein set out.

Wherefore your petitioner humbly prays that an order may issue out of this honorable court assigning, under section 15 of the act of March 3, 1891, the Territory of Hawaii to the ninth circuit; and in order that the steps heretofore taken by petitioner in its attempted appeal to the United States Circuit Court of Appeals for said Ninth Circuit may be effective, your petitioner further prays that a *nunc pro tunc* order may so issue as of date June 15, 1900, as being the date at which the act to provide a government for the Territory of Hawaii went into effect.

And therefore your petitioner further humbly prays that a writ of mandamus in due form may issue herein, directed to the said United States Circuit Court of Appeals for the Ninth Circuit and to the Honorable Judges thereof, the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, commanding and enjoining them to set aside said order of said Court made and entered in said cause on the first day of April, A. D. 1901, as aforesaid, denying said petition and motion for allowance of appeal of your petitioner as appellant therein, and to entertain said cause in said United States Circuit Court of Appeals for the Ninth Circuit and to hear and decide the same on its merits, and for such other and further relief as your petitioner may be entitled to by virtue of the premises, and for his reasonable costs and disbursements herein; and that, pending the consideration hereof and such further proceedings as may be had in this Honorable Court, all proceedings in said cause may be stayed, to the end that your petitioner may have full and perfect relief in the premises; and as in duty bound your petitioner will ever pray.

DUANE E. FOX,
*For the Wilder's Steamship Company.*

KINNEY, BALLOU & MCCLANAHAN,
NATHAN H. FRANK,
*Proctors for the Petitioner.*

DISTRICT OF COLUMBIA, *ss:*

I, Duane E. Fox, being first duly sworn, do depose and say that I am one of the counsel for the petitioner herein, that I have read the foregoing petition by me subscribed, and that the facts therein stated are true.

Duane E. Fox.

Subscribed and sworn to before me this 12th day of April, 1901.

[SEAL.] JOHN W. BRAWNER,
*Notary Public.*

EXHIBIT A.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH JUDICIAL CIRCUIT. IN ADMIRALTY.

GEO. U. HIND, C. A. SPRECKELS, RUDOLPH SPRECKELS, G. WEMPE, WM. CARSON, H. D. BENDIXEN, JAS. H. NELSON, M. O. SIVERSEN, F. O. JOHANSEN, GEO. A. NELSON, N. J. MCLEOD, G. M. FAGERLUND, J. S. HELLINGSEN, JOHN PILTZ, and HENRY M. WETHERBEE, *Libelants and Appellees,*

*vs.*

WILDER'S STEAMSHIP COMPANY (an Hawaiian Corporation), *Respondent and Appellant.*

*Petition and Stipulation for Approval of Bond, etc.*

*To any Judge of the Circuit Court of Appeals of the Ninth Judicial Circuit:*

Comes now your petitioner, The Wilder Steamship Company, a Hawaiian corporation, and respectfully represents:

I.

That on November 9th, A. D. 1900, a decree in the above-entitled case was entered by the supreme court of the Territory of Hawaii, being the highest court of record in said

Territory, for the libelants therein in the following language:

"That the libelants, George U. Hind, C. A. Spreckels, Rudolph Spreckels, G. Wempe, Wm. Carson, H. D. Bendixen, Jas. H. Nelson, M. O. Siversen, F. O. Johansen, Geo. A. Nelson, N. J. McLeod, G. M. Fagerlund, J. S. Hellingsen, John Piltz, and Henry M. Wetherbee, have and recover from the libelee, Wilder Steamship Company, the sum of fifty-five thousand dollars ($55,000), in legal money of the United States, with interest thereon at the rate of six per cent. per annum, and their costs and disbursements in said action incurred, taxed at $623.60.

"That from the said judgment be deducted the sum of $550, realized from the sale of the wreck of the '*William Carson*,' less the amount of the costs of the said sale, taxed by the clerk at the sum of $180.75, making the total of said deduction, the sum of $369.25 and the total amount of the judgment awarded the sum of $54,630.75, with interest as aforesaid from May 1st, 1900, and the sum of $623.60, costs."

II.

That thereafter, to wit, upon November 9th, A. D. 1900, your petitioner herein, libelee in the above-entitled case, gave due notice of its intention to appeal said case to the circuit court of appeals for the ninth judicial circuit, and upon the same day duly filed its notice of appeal and petition of appeal and assignment of errors.

III.

That thereafter, to wit, upon November 10th, A. D. 1900, your petitioner, the libelee in the above-entitled cause, having received from the clerk of the supreme court of the Territory of Hawaii a certificate to the effect that the assignment of errors and petition of appeal had been duly filed, moved the supreme court of the Territory of Hawaii to fix the amount of bond to stay execution, pending appeal in the above-entitled cause, which motion having been duly

filed and presented to the said supreme court of the Territory of Hawaii they refused to grant.

IV.

That thereafter, to wit, upon November 12th, 1900, your petitioner herein, acting by its attorneys, Kinney, Ballou & McClannahan, procured from Mr. Paul Neumann, attorney for libelants in the above-entitled cause, a stipulation, a copy of which is hereto annexed, to the effect that a bond in the sum of one hundred and ten thousand dollars ($110,000), with the Wilder Steamship Company as principal and William C. Wilder and William G. Brash, both residents of Honolulu, Territory of Hawaii, would be acceptable to him.

Wherefore, your petitioner prays that your honor will approve of the said bond, both as to the amount and as to the sureties thereon.

WILDER STEAMSHIP COMPANY,
By its attorneys, KINNEY, BALLOU & MCCLANAHAN.
H. A. B.

CIRCUIT COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT. IN ADMIRALTY.

GEORGE U. HIND, C. A. SPRECKELS, RUDOLPH SPRECKELS, G. WEMPE, WM. CARSON, H. D. BENDIXEN, JAS. H. NELSON, M. O. SILVERSEN, F. O. JOHANSEN, GEO. A. NELSON, N. J. MCLEOD, G. M. FAGERLUND, J. S. HELLINGSEN, JOHN PILTZ, and HENRY WETHERBEE, *Libelants and Appellees*,

*vs.*

WILDER'S STEAMSHIP COMPANY (an Hawaiian Corporation), *Respondent and Appellant.*

*Stipulation as to Bond.*

It is hereby stipulated and agreed by and between the respective counsel and proctors in the above-entitled cause that the bond to stay execution in the above-entitled cause

may be drawn in the sum of one hundred and ten thousand ($110,000) dollars, with the Wilder's Steamship Company, an Hawaiian corporation, as principal, and William C. Wilder and William G. Brasch as sureties thereon; and that the filing of such bond may, until the right of appeal in this present cause shall have been settled by competent authority, have the same effect as to the staying of execution in the above-entitled cause as if said bond had been regularly fixed and approved by a justice either of the supreme court of the Territory of Hawaii or of the circuit court of appeals of the ninth judicial circuit.

Honolulu, November 12, A. D. 1900.

(Sig.) PAUL NEUMAN, *Proctor for Libelants.*
KINNEY, BALLOU & MCCLANAHAN,
*Proctors for Respondent.*

(Endorsed:) Circuit court of appeals, ninth judicial circuit. Geo. U. Hind *et al. vs.* Wilder's Steamship Co., a corporation. Stipulation. Kinney, Ballou & McClanahan.

(Endorsed:) 662. United States court of appeals, ninth judicial court. Geo. U. Hind *et al. vs.* Wilder's Steamship Co. (a corporation). Petition and stipulation for approval of bond, etc. Filed November 30, 1900. F. D. Monckton, clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH JUDICIAL CIRCUIT. IN ADMIRALTY.

GEORGE U. HIND, C. A. SPRECKELS, RUDOLPH SPRECKELS, G. WEMPE, WILLIAM CARSON, H. D. BENDIXEN, JAMES H. NELSON, M. O. SIVERSEN, F. O. JOHANSEN, GEORGE A. NELSON, N. J. McLEOD, G. M. FAGERLUND, J. S. HELLINGSEN, JOHN PILTZ, and HENRY M. WETHERBEE, *Libelants and Appellees,*

*vs.*

WILDER'S STEAMSHIP COMPANY (an Hawaiian Corporation), *Respondent and Appellant.*

*Bond Staying Execution.*

Know all men by these presents that we, The Wilder Steamship Company, a corporation organized, existing, and doing business under the laws of the Territory of Hawaii, in the city of Honolulu, Territory of Hawaii, as principal, and we, William C. Wilder and William G. Brash, both residents of Honolulu, Territory of Hawaii, as sureties, are held and firmly bound unto Geo. U. Hind, C. A. Spreckels, Rudolph Spreckels, G. Wempe, Wm. Carson, H. D. Bendixen, Jas. H. Nelson, M. O. Siversen, F. O. Johansen, Geo. A. Nelson, N. J. McLeod, G. M. Fagerlund, J. S. Hellingsen, John Piltz, and Henry M. Wetherbee in the sum of two hundred and fifty (250) dollars, and in the further sum of one hundred and ten thousand (110,000) dollars, to be paid unto the said Geo. U. Hind, C. A. Spreckels, Rudolph Spreckels, G. Wempe, Wm. Carson, H. D. Bendixen, Jas. H. Nelson, M. O. Siversen, F. O. Johansen, Geo. A. Nelson, N. J. McLeod, G. M. Fagerlund, J. S. Hellingsen, John Piltz, and Henry M. Wetherbee, their heirs, executors, administrators, and assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, execu-

tors, and administrators, jointly and severally by these presents.

The condition of the foregoing obligation is as follows: That whereas the Wilder Steamship Company, as libelee in the above-mentioned cause, has appealed to the United States circuit court of appeals for the ninth judicial circuit from a decree of the supreme court of the Territory of Hawaii, bearing date the 9th day of November, A. D. 1900, in a suit in which Geo. U. Hind, C. A. Spreckels, Rudolph Spreckels, G. Wempe, Wm. Carson, H. D. Bendixen, Jas. H. Nelson, M. O. Siversen, F. O. Johansen, Geo. A. Nelson, N. J. McLeod, G. M. Fagerlund, J. S. Hellingsen, John Piltz, and Henry M. Wetherbee are libelants against the said Wilder Steamship Company as libelee, and ordering the said Wilder Steamship Company to pay the said libelants the sum of fifty-five thousand dollars in lawful money of the United States, with interest thereon at the rate of six per cent. per annum and their costs and disbursements in said action contained, taxed at $623.60;

That from said judgment be deducted the sum of $550 realized from the sale of the wreck of the "*William Carson*," less the amount of the costs of said sale, taxed by the said clerk at the sum of $180.75, making the total of said deduction the sum of $369.25, and the total amount of the judgment awarded the sum of $54,630.75, with interest, as aforesaid, from May 1st, 1900, and the sum of $623.60 costs; and

Whereas the said Wilder Steamship Company desire during the progress of such appeal to stay the execution of the said decree of the supreme court of the Territory of Hawaii:

Now, therefore, if the above-named appellant, The Wilder Steamship Company, shall prosecute the said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States circuit court of appeals for the ninth circuit of this cause, all on the mandate of said court by the court ap-

pellate, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

WILDER STEAMSHIP Co., *Principal,*
By its duly appointed agent-in-fact—
(Sig.) S. R. ROSE.
(Sig.) W. C. WILDER, *Surety.*
(Sig.) WM. G. BRASH, *Surety.*

Subscribed and sworn to before me this 9 day of November, 1900.

[SEAL.] S. R. JEHU,
*Notary Public, First Judicial Circuit.*

(Endorsed): U. S. C. C. of app. Hind *et al. vs.* Wilder's S. S. Co. Bond.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be full, true, and correct copies respectively of the petition and stipulation for approval of bond, etc., stipulation as to bond, and bond staying execution, on file and of record in the cause entitled The Wilder's Steamship Company, etc., appellant, *vs.* George U. Hind *et al.*, No. 662, as the same appear and remain of record in my office.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 2nd day of April, A. D. 1901.

F. D. MONCKTON, *Clerk,*
By MEREDITH SAWYER,
[SEAL.] *Deputy Clerk.*

10c. revenue stamp.

EXHIBIT B.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE WILDER'S STEAMSHIP COMPANY (a Hawaiian Corporation), *Appellant*,
*vs.*
GEORGE U. HIND ET AL., *Appellees*.
} No. 662.

Paul Neumann, Henry Eickhoff, and Curtis H. Lindley for the appellees.

Kinney, Ballou & McClanahan, and Nathan H. Frank for the appellants.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, *Circuit Judge*, delivered the opinion of the court:

The question presented in this case is whether this court has jurisdiction to entertain an appeal from the supreme court of the Territory of Hawaii in an admiralty case. The suit was begun by filing a libel in admiralty in the circuit court of the first circuit, Hawaiian islands, island of Oahu, on February 9, 1900. The case was heard in that court upon April 9 and was decided on May 7, 1900, and thereupon, upon that date, was appealed to the supreme court of the Hawaiian islands, in which court a final decree was rendered on November 9, 1900, whereupon notice was given of appeal therefrom to this court. The Territory of Hawaii was created by the act of Congress approved April 30, 1900, entitled "An act to provide a government for the Territory of Hawaii." By its terms the act was to take effect forty-five days after the approval thereof. The provisions of the act which may be said to relate to the question which is presented in this case are the following:

"SEC. 2. That the islands acquired by the United States of America under an act of Congress entitled 'Joint resolu-

tion to provide for annexing the Hawaiian islands to the United States,' approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii.

"SEC. 3. That a territorial government is hereby established over the said Territory, with its capital at Honolulu, on the island of Oahu.

"SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: * * *

"SEC. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.

"SEC. 7. That the Constitution of the Republic of Hawaii and the laws of Hawaii, as set forth in the following acts, chapters, and sections of the civil laws, penal laws, and session laws, and relating to the following subjects, are hereby repealed."

(Here follows a list of the laws repealed. Among the laws so repealed are the laws of the former Republic relating to jurisdiction in maritime matters.)

"SEC. 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed; * * * All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii."

Chapter IV provides a judiciary for the Territory and establishes the jurisdiction of the several courts composing the same. Section 86 provides as follows:

"SEC. 86. That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. * * * Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

It is contended that the present appeal, being an appeal in an admiralty case, is not comprehended within the terms of the Hawaiian statute regulating appeals from the supreme court of the Territory, but that it is one of the cases referred to in section 15 of the act of March 3, 1891, establishing the circuit court of appeals and conferring jurisdiction upon that court over appeals from and writs of error to the courts of the Territories. Upon consideration of the various provisions of the act providing a government for the Territory of Hawaii we are convinced that Congress intended thereby to establish in that Territory between the Federal court created by the act and the system of territorial courts then existing and substantially by the act perpetuated the relation which exists between the courts of the United States and the State courts in the various States. It is not disputed that Congress

had the power to create in the Territory of Hawaii such a system of courts and to establish such a relation between them. The purpose to do so is manifest from various provisions of the act. By section 10 it was declared that all rights of action, suits at law and in equity, and other proceedings then pending in the courts of the Republic of Hawaii should be carried on to final execution and judgment in the corresponding courts of the Territory of Hawaii. Conceding that cases in admiralty are a class of cases separate and distinct from all others, and that the Constitution extends the judicial power of the United States over three distinct classes of controversies, one of which is "all cases of admiralty and maritime jurisdiction," and that it is true, as stated in the language of Chief Justice Marshall in American Insurance Company *vs.* Canter, 1 Peters, 545, that the Constitution contemplates these as three distinct classes of cases and "the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two," still, we think, it is clear from the language of section 10 that Congress intended to make a general provision in regard to all classes of suits and actions of whatsoever nature then pending in the courts of the Republic of Hawaii and to exclude none whatever. The words "and other proceedings" are sufficiently comprehensive when used in connection with the language which precedes them to include admiralty suits. The present suit was a case pending in the courts of the Republic of Hawaii both at the date when the act was approved and when the act went into effect. It proceeded in those courts to a final judgment of the supreme court of the Territory. In section 86 we have the clearly expressed purpose of Congress to provide that the laws of the United States relating to appeals, writs of error, removal of causes and other proceedings as between courts of the United States and the courts of the several States shall govern in like matters and proceedings as between the Federal court and the territorial courts of the Territory of

Hawaii. This can only be construed to mean that final decisions of the supreme court of the Territory of Hawaii may be reviewed in a court of the United States only in such cases and upon such conditions as the decisions of the supreme court of a State might be thus reviewed, or, in other words, that no appeal shall lie to any United States circuit court of appeals from the final judgment of the supreme court of the Territory of Hawaii, and that the only appeal from such territorial court shall be to the Supreme Court of the United States, and only in such cases as are appealable to that court from the supreme court of a State. The right of appeal is statutory. If it exists in the present case, it must be found in the letter of the law. We are asked to apply to the statute certain rules of construction; but the language employed is not involved or ambiguous. Its meaning is evident upon the first reading. We must be guided by its plain import. We find therein nothing to authorize the appeal which is here attempted to be taken. If Congress had established in the Territory of Hawaii a system of territorial courts only, an appeal from the decision of the highest court of the Territory would, of course, be reviewable in the United States circuit court of appeals under the provisions of the act creating the latter court. But, in this instance, Congress has created two systems of courts—one a district court for the jurisdiction of Federal causes, the other for the trial of all other cases. It has provided specially for appeal to this court from the decisions of the district court. It has made no such provision for appeal from the final decision of the territorial court, but has enacted a general statute, the intention of which and the purport of which was to place the supreme court of the Territory upon the basis of the supreme courts of the States in all matters which concern their relation to the courts of the United States. The system of courts created by the act for the Territory of Hawaii differs radically from the system of courts which Congress had theretofore created for any of

the Territories. In no other Territory has there been a division of jurisdiction between cases which properly belong to courts of the United States and other cases. Congress found in the Republic of Hawaii a system of courts already established whose jurisdiction was complete, and from the highest tribunal of which there was no appeal. To that system Congress by the act added a district court, conferring upon it the jurisdiction which pertains to the district and circuit courts of the United States, and providing for removing to that court from the territorial courts causes which under the removal acts were removable from a State court to a court of the United States. The fact that the present case is a suit in admiralty, and as such would have been within the jurisdiction of the district court created by the act if it had been commenced after the date when the act went into effect, cannot affect the question which is before us. The case is purely one of the construction of the terms of the act. We might have disposed of the application to allow the appeal by referring to the fact that the Supreme Court has not assigned to this court appeals from the Territory of Hawaii; but we have preferred to meet the question upon the broader ground above indicated. The motion for the allowance of the appeal must be denied.

(Endorsed:) Opinion. Filed April 1, 1901. F. D. Monckton, clerk.

At a stated term, to wit: the October term A. D. 1900 of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday the first day of April in the year of our Lord one thousand, nine hundred and one.

Present: The Honorable William W. Morrow, circuit judge; Honorable John J. De Haven, district judge.

THE WILDER'S STEAMSHIP COMPANY (a Hawaiian Corporation), *Appellant*,
*vs.*
GEORGE U. HIND, C. A. SPRECKELS, RUDOLPH SPECKELS, G. WEMPE, WILLIAM CARSON, H. D. BENDIXEN, JAMES H. NELSON, M. O. SIVERSEN, F. O. JOHANSEN, GEORGE A. NELSON, N. J. MCLEOD, G. M. FAGERLUND, J. S. HELLINGSEN, JOHN PILTZ and HENRY M. WETHERBEE. } No. 662.

This cause heretofore submitted to the court for consideration and decision upon the petition and motion of the appellant for the allowance of an appeal to this court and for the approval of a bond on appeal having been duly considered and an opinion having been filed,

It is ordered that said petition and motion be, and the same are hereby denied.

(Endorsed:) Order denying petition and motion for appeal, &c. Filed April 1, 1901. F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true and correct copy of an opinion and order denying petition and motion for an appeal, &c., filed in the above-entitled cause as the originals thereof remain and appear of record in my office.

Attest my hand and the seal of said circuit court of appeals at San Francisco, California, this 2nd day of April, A. D., 1901.

[SEAL.] F. D. MONCKTON, *Clerk*.

10c. revenue stamp.

No. 18 Orig.

FILED
APR 15 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Fox for Petitioner.

# Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 15, 1901.

*No.* , *Original.*

*EX PARTE:* IN THE MATTER OF THE PETITION OF THE WILDER'S STEAMSHIP COMPANY FOR WRIT OF MANDAMUS

IN

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLE WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, JUDGES THEREOF, RESPONDENTS.

## ARGUMENT IN SUPPORT OF PETITION.

DUANE E. FOX,
KINNEY, BALLOU & MCCLANAHAN,
NATHAN H. FRANK,
*Attorneys for the*
*Wilder's Steamship Company, Petitioner.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-12-'01

# Supreme Court of the United States.

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*vs.*

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLE WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, JUDGES THEREOF, RESPONDENTS.

## ARGUMENT IN SUPPORT OF PETITION.

### STATEMENT OF THE CASE.

This matter arises from the peculiar situation of litigants who were in the courts of admiralty jurisdiction in the Republic of Hawaii at the time of the transfer of the jurisdiction of said courts to the courts established by the Act of Congress approved April 30, 1900, organizing the Territory of Hawaii. The only question presented here is as to whether the right of appeal exists in such cases from the Supreme

Court of the Territory to the United States Circuit Court of Appeals for the Ninth Circuit.

The petitioner herein was, as shown by the petition, respondent in an admiralty cause which was pending in the Supreme Court of the Republic at the time when the Act of April 30, 1900, became effective. Under section 10 of that Act the Supreme Court of the Territory took jurisdiction and rendered a decree against the respondent. An appeal to the United States Circuit Court of Appeals for the Ninth Circuit was denied, both by the Supreme Court of the Territory and by the Circuit Court of Appeals. The purpose of the petition is to compel the latter court to take jurisdiction.

## I.

### ADMIRALTY CASES A CLASS BY THEMSELVES.

In approaching this question it is necessary, in order that we may thoroughly understand the proposition under discussion, that we fix in our minds the principal fact upon which our contention to jurisdiction is founded.

It is, that this is a case in admiralty, and as such is *not* comprehended within the terms of the act of 1900, regarding appeals from the Supreme Court of the Territory, and *is* comprehended within the terms of the fifteenth section of the Act of March 3rd, 1891, establishing the Circuit Court of Appeals, whereby jurisdiction is conferred upon said Court.

Under the Constitution of the United States admiralty cases are a class distinct and separate from all others. The Constitution extends the judicial power of the Federal Courts to three distinct classes of cases, one of which is "cases in law and equity", and another of which is "all cases of admiralty and maritime jurisdiction" (Art. III, § 2). As said by Chief Justice Marshall:

"The grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The dis-

crimination made between them in the Constitution is, we think, conclusive against their identity."

*American and Ocean Ins. Co.'s vs. 356 Bales of Cotton*, 1 Peters, 545.

## II.

### THE STATUTES.

The statutes applicable to the matter herein presented are, so far as seem to be necessary to its decision, set out in the petition. Briefly they provide as follows:

Sections 6 and 15 of the Circuit Court of Appeals Act confer upon that Court jurisdiction to entertain an appeal in admiralty cases from the decrees of the Supreme Courts of the several Territories.

Section 1891 of the Revised Statutes provided that—

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory hereinafter organized."

This provision was repeated in the Act organizing the Territory as follows:

"SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: Provided," etc.

Section 10 of said Act provides as follows:

"SEC. 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed. * * * All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all

such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this Act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii * * *"

Section 86 of said act provides as follows:

"SEC. 86. * * * The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

There was, then, at the time of the organization of the Territory of Hawaii, an existing law (Act of 1891) conferring the jurisdiction here contended for, *i. e.*, appeals from the Supreme Courts of organized Territories to the Circuit Courts of Appeals. There was at the same time an existing law (section 1891, Revised Statutes) extending the laws of the United States to "every Territory hereafter organized". And at the birth of the present territorial government it was provided (section 5) that the existing laws of the United States should "have the same force and effect within the said Territory as elsewhere in the United States", unless it be locally inapplicable or in said Act "otherwise provided". It is upon the construction of the foregoing legislation that the decision of the present question depends.

## III.

### RULES OF CONSTRUCTION.

Before commenting upon the language of said statutes, let us note the settled rules of construction as laid down by this Court and applicable to the matter in hand.

So far as relates to the question of jurisdiction on appeal,

all of these acts are *in pari materia*—they all relate to the question of appeal from the Supreme Court of the Territory. The two Acts under consideration are also of different dates, the Circuit Court of Appeals Act being the prior act.

Regarding the rules of construction for such statutes, this Court has said that they are so well understood as to need no citation of authorities.

"They are: First: that effect shall be given to all the words of a statute, where this is possible without a conflict; and, Second: that, as regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. *If both can stand by any reasonable construction, that construction must be adopted.*"

Wilmot *vs.* Mudge, 13 Otto, 261.

In *Rosencrans vs. United States*, 165 U. S., 262, a similar question of construction came up as between the original Act admitting Montana into the Union which provided that the State should constitute one judicial district, and a subsequent Act which divided the district into two divisions. The latter Act contained a provision

"That this act shall not affect the jurisdiction, power, and authority of the court as to actions, prosecutions, and proceedings already begun and pending in said district, but the same will proceed as though this act had not been passed, except that the court shall have power, which it may exercise at discretion, to transfer to the court in said division such of said pending actions, prosecutions, and proceedings as might properly be begun therein under the provisions of this act."

The Court conceded that the provisions carry some implication of a distribution of territorial jurisdiction, and said that the question as to whether or not it can be adjudged

that Congress has created such distribution when it has not in terms directed it, simply because some expressions in the statute imply its existence, is a difficult one.

"Yet," the Court proceeded, "we think the true rule of construction is this:

"When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, *where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express*, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. Especially is this rule to control when it appears that Congress in some cases has made express provision for effecting a change. This does not conflict with the doctrine stated *in re Bonner*, 151 U. S., 242, 256, that the jurisdiction of a Court in criminal cases cannot 'be enlarged by any mere inferences from the law or doubtful construction of its terms.' It is rather the converse of that, for the effort is to destroy a jurisdiction otherwise clearly existing, by mere inferences and doubtful construction.

"*This may be a case of mere omission, but it is an omission which the Courts cannot supply.* We cannot assume that because Congress in creating some divisions distributed jurisdiction it meant, in creating other divisions, to also so distribute it, and when we find that in some cases of division it distributed the jurisdiction, and in other cases not, we are not justified in assuming that in this case it intended a distribution which it did not in terms make simply because of the use of the language which somewhat implies that a distribution had already been made."

So also in *Chew Heong vs. United States*, 112 U. S., 536, the Court, in affirming the rule that repeals by implication are not favored, quotes with approval the following language of Justice Story in *Wood vs. United States*, 16 Peters, 362.

"That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the

narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for *it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it*, for they may be merely affirmative or cumulative *or auxiliary*. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and *even then*, the old law is repealed by implication, *only pro tanto*, to the extent of the repugnancy."

The Court also quotes with approval the language of the Court in State *vs.* Stoll, 17 Wall., 430, as follows:

"It must appear that the later provision is certainly and clearly in hostility to the former. *If, by any reasonable construction, the two statutes can stand together, they must so stand.* If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be."

Applying these rules of construction to the statutes in question, what is there in the Act of April 30, 1900, that makes it impossible, so far as relates to an admiralty case, for both provisions under consideration to stand? Is there not a reasonable construction under which, so far as relates to admiralty cases, the right of appeal from the Supreme Court of the Territory is preserved? If there be, in the language of *Wilmot vs. Mudge*, "*that construction must be adopted.*"

Applying the language in *Rosencrans vs. United States*, we have before us in section 15 of the Court of Appeals Act, a statute "clearly defining the jurisdiction of the court" wherein "Congress has expressly legislated in respect to (the) matter," and unless we find the Act of 1900 "equally express" the former "must control."

## IV.

THERE IS NO PROVISION IN THE ACT OF 1900 TAKING AWAY THE RIGHT OF APPEAL IN ADMIRALTY CASES CONFERRED BY THE EXPRESS PROVISION OF THE COURT OF APPEALS ACT.

1. The language of section 10 of the Act, above quoted, does not take it away.

That section does not mention admiralty causes, either expressly or by necessary implication. As we have already seen, admiralty cases are a distinct and well-recognized class of cases, and while section 10 enumerates criminal and penal proceedings, actions at law, and suits in equity, it does not mention admiralty causes. Unless, therefore, such causes be included in the language "other proceedings then pending in the courts of the Republic of Hawaii," the section contains no provision relating to them.

But conceding that they are included within the language "other proceedings then pending," etc., the Act provides simply that such causes "shall be carried on to final judg-"ment and execution in the corresponding courts of the Ter-"ritory of Hawaii." This language does not, either expressly or by implication, take away the right to appeal from such courts, for under the Circuit Court of Appeals Act, and in fact, under the settled policy of the law throughout the land, the right of appeal generally is confined to the final judgments of the courts, and that, too, from the courts having the power to carry their final judgments on to execution. As a rule the appellate courts do not carry the judgment to execution. The proposition is patent, and appears upon the face of the statutes.

For instance, sections 691 and 693 of the Revised Statutes provide for a review of any "final judgment" of the circuit court and section 633 of the "final judgments of a district

court;" section 702 provides for appeal from the "final judgments" of the supreme courts of the Territories and section 705 from the "final judgment" of the supreme court of the District of Columbia; while section 701 provides that the Supreme Court shall *not issue execution* in a cause removed before it from a circuit court, or district court acting as a circuit court, or of a district court in prize causes, but shall send a special mandate to the inferior court "to award execution thereupon" and section 916 provides for execution to be issued by said courts.

In *McLish vs. Roff*, 141 U. S., 661, it was held that the omission of the word "final" in the fifth section of the Court of Appeals Act did not permit an appeal except from a final judgment, and that any other construction would render the Act inconsistent with the long-established object and policy of the Acts of Congress in relation to appeals and writs of error.

Thus a construction is placed by Congress upon the language used in section 10 that leaves no room for the construction that by it a right of appeal is cut off.

2. Nor does section 86 contain any such provision. This section provides that the laws of the United States "as be-"tween the courts of the United States and the courts of the "several states shall govern" in the matter of appeals from the supreme court of the Territory.

To ascertain the meaning of this language, it is necessary to refer to those laws. The Act of 1900 is in this respect incomplete, and incorporates within itself that section of the Revised Statutes relating to appeals, etc., from state courts to the federal courts.

So far as this language of the Act of 1900 is concerned, it does not expressly nor by necessary implication include admiralty cases. On the contrary the necessary implication is that so far as relates to the matter there treated of, admiralty cases are excluded, because the method of appeal

is to be governed by the laws relating to appeals from state courts, and state courts have no jurisdiction in admiralty cases.

This suggestion is strengthened when we come to consider the statute referred to, as containing the governing law in such cases, viz: section 709 of the Revised Statutes.

That section provides for a writ of error in three well defined cases, viz: 1. In a case where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, etc.; 2. Where is drawn in question the validity of a statute of, or an authority exercised under any State, upon the ground of their being repugnant to the Constitution, etc.; 3. Where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, etc.

Admiralty cases are neither expressly, nor by implication referred to in those laws. As already suggested, they do not provide for a method of appeal in admiralty causes, and are in their very nature incapable of adaptation to them. *Neither do they prohibit* appeals in such cases. They simply leave them untouched. They cannot, therefore, be said to be intended to "govern" appeals in such cases in any Court.

It is clear from the foregoing, that the method of appeal referred to in section 86 was intended to apply to the ordinary jurisdiction of the Territorial court after the federal court (the creation and jurisdiction of which is the special subject-matter of section 86) should have been established. To this view the incorporation of the provision under consideration in section 86 necessarily lends itself. The ordinary jurisdiction of the Territorial court, such as it would be *after* the federal court is established, is coextensive with the jurisdiction of the State courts, and hence at such time no other or different method of appeal than that there provided would be necessary.

But before the organization of the federal court this Territorial court had a different jurisdiction; one that included cases which were after the organization of the federal court transferred to the latter, *with the right of appeal in such cases to the Circuit Court of Appeals of the Ninth Circuit.* For that jurisdiction the system of appeal from the supreme court of the Territory provided for in section 86 is inadequate, and unless our construction be the true construction of the statute, the right of appeal in such cases fails when the action is in the one court and succeeds when in the other.

There is then no necessary repugnance between section 86 of the Act of 1900 and section 15 of the Circuit Court of Appeals Act, with reference to appeals in admiralty cases. On the contrary section 86 bears internal evidence of intention to permit a review in that class of cases. As to such causes both statutes may stand and be operative, and in view of the foregoing considerations we consider this construction reasonable, and, under the authorities above cited, necessary.

We think, also, that this construction has the direct sanction of this Court in a similar case.

In *Shute vs. Keyser*, 149 U. S., 649, the question of the right of appeal to the United States Supreme Court from the supreme court of a Territory was brought in question by reason of the provision in the Court of Appeals Act that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed."

The contention was that section 702 of the Revised Statutes providing for appeals from the supreme courts of the Territories to the Supreme Court of the United States was inconsistent with the provisions of the Circuit Court of

Appeals Act, and therefore repealed by virtue of the foregoing clause.

We can readily see that this would be true with respect to such cases as were by section 6 of the Act made final in the Circuit Court of Appeals, for appeal in such cases is provided for in section 15. But the case there under consideration was not one made final in the Circuit Court of Appeals, and this Court held as follows:

"There was no provision for appeals or writs of error in cases not made final by section six from the supreme courts of the territories to the circuit courts of appeals, and there was no express repeal of the provisions of the prior acts regulating appeals or writs of error in such other cases from those courts to this. There is nothing to indicate an intention that the judgments and decrees of the supreme courts of the territories should not be susceptible of review in the class of cases in which there was no appeal or writ of error to the circuit courts of appeals.

"The result is that, as the acts regulating appeals or writs of error from or to the supreme courts of the territories to or from this court were not repealed, except to the extent specified, an appeal or writ of error lies to this court from the judgments or decrees of those courts, except in cases where the judgments of the circuit courts of appeals are made final."

We think the analogy between the facts of this case and those in *Shute vs. Keyser* perfect and conclusive.

That case was subsequently affirmed in *Folsom vs. United States*, 160 U. S., 121.

## V.

### THE REASON AND INTENT OF THE LEGISLATION.

If our contention that there is no repugnance, so far as relates to admiralty causes between the Hawaiian Act of 1900 and section 15 of the Circuit Court of Appeals Act be correct, then the latter is not "locally inapplicable". But

it was argued in the lower court and the suggestion adopted by that court, that it was the intent of the Legislature to organize the Territorial courts upon the lines of the State courts, to the end that all cases of a local nature could be tried and determined finally in the Islands.

We may, for the purposes of argument, concede this, yet our position is not thereby weakened, but rather strengthened. The analogy between the Territorial courts and the State courts cannot affect the question of appeals in admiralty causes, for, as we have already seen, the State courts have no such jurisdiction. We have the further fact that admiralty causes are not local in their nature, but international in their character, and it is for this reason and no other, that Congress has seen fit to take them out of the jurisdiction of State courts, and placed them in the exclusive jurisdiction of the federal courts. Now, the provisions of the Hawaiian Act of 1900 indicate no exception to this policy, for, by section 86, the very same division of jurisdiction is provided for. The jurisdiction of the Territorial court in the present case arose from the fact that the Territory became American before the federal court was organized, and being American territory, there is no reason why a policy should attach before the organization of a federal court different from that which the statute marks out after the organization of that court. The court does not create the policy; it is merely an instrument in carrying it out, and mere change in the instrument does not change the policy. Both courts were provided with the necessary machinery to carry it out.

The foregoing considerations, and particularly the transfer of the jurisdiction in such cases to the federal courts, where the right of appeal is expressly reserved, indicate that it was the intention of Congress that admiralty causes should remain, with respect to the right of appeal, where the law found them when the Hawaiian Act of 1900 was passed,—

an exception to the rule provided in that Act for appeals from the Territorial court.

Indeed, in this very litigation we have before this Court the anomaly of two suits arising out of the same collision, the present one (that on behalf of the lost ship) brought in the Territorial courts, and the other (that on behalf of her cargo) brought in the federal court of the Territory. In the latter no one doubts the right of appeal. As both causes arose out of the same transaction and at the same time, any policy that would deprive us of this appeal would likewise prohibit an appeal in its sister case from the federal court.

We respectfully submit that there is nothing in the policy of the law or the terms of the act that takes away the right of appeal conferred by section 15 of the Act of 1891, establishing the Circuit Court of Appeals.

## VI.

### The assignment of the Territory of Hawaii to the Judicial Circuit under the Act of March 3, 1891.

The petition contains a prayer that the Territory of Hawaii be assigned to the Ninth Judicial Circuit under section 15 of the act of March 3, 1891. The petitioner does not wish to be understood as presuming to suggest to the Court in what manner the discretion of the Court shall be exercised in making such assignment or to designate the particular circuit to which, if it please the Court to make such assignment at all, the Territory of Hawaii shall be attached. But the petitioner has assumed, perhaps not improperly, that for geographical reasons and because the Act of 1900 provides for appeals in admiralty causes from the district court established by that act to the Circuit Court of Appeals for the Ninth Circuit, the Territory will, if assigned, be attached to that circuit. And so, in the effort to protect its rights, the petitioner has attempted to take its appeal to that court.

If it shall please the Court to make such assignment it will evidently be proper that such order be so made as to relate back to the date when the act organizing the Territory of Hawaii became effective. Until the decision of this Court upon the present petition, it cannot be known that such assignment is a proper one to be made at any time. But if this Court shall hold it to be proper, for the protection of parties litigant, to make such assignment, either generally or to cover the special and peculiar circumstances growing out of the transfer of jurisdiction, the fact that the assignment was not sooner made ought not to operate to the prejudice of the petitioner, the delay not having arisen from his act.

An example of a *nunc pro tunc* order under somewhat analogous circumstances is found in

*Ex parte* Railroad Company, 95 U. S., 221.

The appellee could not complain of such an order, for it has been held by many decisions of this court that where a right is conferred by statute, to be made certain by the action of a public officer, the right does not depend on the action of such officer but on the act of Congress itself.

## VII.

### MANDAMUS THE PROPER REMEDY.

"The writ of mandamus lies, as held in *Ex parte* Parker, 120 U. S., 737, where an inferior court refuses to take jurisdiction when by law it ought to do so."

*Ex parte* Parker, 131 U. S., 221.

*Ex parte* Jordan, 94 U. S., 248.

## VIII.

### THE PRAYER FOR A STAY OF PROCEEDINGS.

The petition shows that by the refusal of the Circuit Court of Appeals to take jurisdiction great injury to the petitioner is imminent. Until such refusal execution was stayed by virtue of the stipulation between the parties and the bond executed thereunder. The termination of the proceedings before the Circuit Court of Appeals leaves the petitioner without protection, even during the consideration of the matter by this Court. It is well settled that this Court, where the circumstances require it, will issue a stay of proceedings, "under the general power conferred upon this Court by the fourteenth section of the Act of the 24th of September, 1789." This will be done even when "leaving the question, whether a writ of error will lie to the judgment in this case, an open one."

Hardeman *vs.* Anderson, 4 How., 642.

"Upon the facts stated in the application, there is no doubt that the writ of error, bond, and citation, having been given in due season according to law, operated as a stay of execution, and that a *supersedeas* to the *fieri facias* ought to issue from this court, to supersede and quash the same, as prayed for in the motion. Indeed, the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below. But it is equally competent for this court to do the same thing in furtherance of the purposes of justice."

Stockton *et al. vs.* Bishop, 2 How., 75.

It is respectfully submitted that mandamus should issue as prayed.

DUANE E. FOX,
KINNEY, BALLOU & MCCLANAHAN,
NATHAN H. FRANK,
*Attorneys for the*
*Wilder's Steamship Company, Petitioner.*

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed May 17, 1901.

No. 18, Original.

---

EX PARTE: IN THE MATTER OF THE PETITION OF THE WILDER'S STEAMSHIP COMPANY FOR WRIT OF MANDAMUS

vs.

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLES WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, JUDGES THEREOF, RESPONDENTS.

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## BRIEF IN REPLY.

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DUANE E. FOX,
NATHAN H. FRANK,
KIDDER, BALLOU & MCCLANAHAN,
*Attorneys for The Wilder's Steamship Company, Petitioner.*


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# Supreme Court of the United States.

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*vs.*

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## BRIEF IN REPLY.

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### STATEMENT OF MATERIAL QUESTION.

The petitioner, replying to the brief filed in opposition to the issuance of the writ, has this to say:

The material question presented is: **Does the act of 1900, in any of its provisions, make applicable to Hawaii the provisions of the act of 1891 relating to appeals, in admiralty causes, from the final judgments of territorial supreme courts?**

In this consideration it must be admitted that section 86 of the act of 1900 in terms does not touch the question, and the effort is therefore made to show that such appeals are excluded on the theory that certain other sections of the act, taken together with this one, were intended to provide a *complete* judicial system, and that as the system so provided does not touch the question, such appeals are necessarily excluded therefrom.

## I.

### SOURCE OF COURT'S JURISDICTION.

As a preface to our criticism of this argument, it may not be out of place to reply briefly to respondents' contention as to the source of the jurisdiction of the courts of the Hawaiian islands over *admiralty causes* during the so-called transition period. It is advanced in argument that *such* causes—for they are necessarily included in the expression "pending actions"—"must be treated as governed entirely by the *municipal laws* then in force" (page 17 of brief), for "until the organic act went into effect there was no statute of the United States which had any operation in Hawaii" (page 10 of brief).

If this be so, then it necessarily follows that the court's jurisdiction was derived from such "municipal laws."

This conclusion we cannot admit.

Upon the transfer of sovereignty the Congress provided:

"The municipal legislation of the Hawaiian islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine" (Joint resolution of July 7, 1898, 30 Stats., 750).

The question then presented is, Would a municipal law of the Republic of Hawaii granting to a former court of that extinct government jurisdiction over an *admiralty cause* be a law *inconsistent* with the joint resolution or *contrary* to the Constitution of the United States?

We submit that obviously it would be both *inconsistent*, in that the resolution itself provides that:

"Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands, shall be vested in such person or persons, and shall be *exercised* in such manner as *the President of the United States shall direct;* and the President shall have power to remove said officers and fill the vacancies so occasioned."

*and contrary to the Constitution of the United States*, for the reason that a court held to be created and exercising jurisdiction over admiralty and maritime causes, *within territory under American sovereignty*, by virtue of a municipal law of the former Republic of Hawaii, would be so exercising such jurisdiction in plain violation of article III, section 2, of the Constitution.

It is our contention that the court of this transition period was a creation of Congress. To hold otherwise is to deny to Congress and to the President, acting under its authority, the right, *which was exercised*, to direct how the "civil, judicial, and military powers" of the Hawaiian islands should be "*exercised*" after the passage of the act annexing these islands "as a part of the territory of the United States" and "subject to the sovereign dominion thereof." Nor does it lend aid to the contention of the respondents that by section 7 of the act of 1900 the "constitution of the Republic of Hawaii" and certain "laws of Hawaii" were repealed. These were not thus repealed as laws deriving their force from the legislative enactments of an extinct republic, but as laws whose sole efficacy sprang from the exercise of legislative power temporarily invested in the President of

the United States. And these laws are referred to in the repealing clause of the act of 1900 as "*the laws of Hawaii*," because section 1 of this act provides that the phrase "*the laws of Hawaii* as used in this act without qualifying words shall mean the constitution and laws of the *Republic of Hawaii in force* on the twelfth day of August, 1898, at the time of the transfer of the sovereignty of the Hawaiian islands to the United States of America," and which were subsequently continued *in force* by the exercise of the power conferred on the President of the United States by the act of 1898.

It is absurd to claim that after the extinction of the sovereignty called the Republic of Hawaii by its annexation to the United States any power was left in that sovereignty. Whatever powers, judicial or other, were thereafter exercised were exercised, not by authority of the body of municipal law under the sanction of an extinct government, but by authority of the sovereignty to which the islands had become subject.

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."

Cooper *vs.* Reynolds, 10 Wall., 308.

The fact that Congress, by the joint resolution, temporarily continued in force, "until Congress shall provide for the government of such islands," the body of substantive law formerly existing in the Hawaiian islands does not alter this principle. Such laws, when so continued in force, were not the municipal laws of the former Republic, but a body of laws enacted and deriving their entire authority from the sovereignty of the United States.

The act of 1898 was superseded entirely by the act of 1900, and therefore all questions of procedure and jurisdiction must be governed by the provisions of the later act. It

follows necessarily that "*the laws of Hawaii*," which were in force at the date of the going into effect of the act of 1900, were not the municipal laws of the former Republic, but the laws made efficacious by the joint resolution of July 7, 1898, and the order of the President based thereon. The expression "the laws of Hawaii heretofore in force," as used in section 81 of the act, can only refer to such laws as had been adopted and revivified by the act of 1898, which in express terms excluded all those that were inconsistent with the resolution or contrary to the Constitution, and even the laws so adopted were by this section of the act of 1900 continued in force only "*except as herein otherwise provided.*"

Out of that court, to which had been given jurisdiction of a Federal question, and which had been exercising such jurisdiction, there is created the supreme court of the Territory of Hawaii (section 81), and it is from the final judgment of such court *in an admiralty cause* that we seek an appeal.

It is irrelevant for the respondents to discuss the possible status or right of a litigant against whom such a final judgment *might* have been rendered during the period from August 12, 1898, to June 15, 1900, for during such time Hawaii was not an organized Territory, nor was its court the "supreme court" of an organized Territory, nor had the general *laws* of the United States *relating to appeals* from final decrees been extended to the Hawaiian islands.

## II.

### HAWAII'S JUDICIAL SYSTEM DOES NOT PRECLUDE APPEAL.

We take up now the consideration of the *theory* that the act of 1900 provides for the Territory of Hawaii a judicial system which necessarily precludes the appeal for which we contend.

If our contention is well taken, that the transition period court of the Hawaiian islands derived its jurisdiction over

admiralty causes, in the first instance, from the act of 1898, and derived its power to *retain such* jurisdiction over pending causes and pass final judgment therein by virtue of section 10 of the act of 1900, then this fact is clearly presented:

*The supreme court of the Territory of Hawaii has, under laws of the United States, rendered a final decree in an admiralty cause.* Is there any Federal statute which allows an appeal from such decree? And, if so, does the judicial system provided for by the act of 1900 preclude the application of such law to the Territory of Hawaii?

We contend that, except as may be otherwise provided in the act of 1900, section 5 of that act is a re-enactment of those laws of the United States not "locally inapplicable" to the Territory of Hawaii. And if, therefore, neither section 86 nor any other provision of the act relates to appeals in admiralty causes from the final decrees of the supreme court of the Territory of Hawaii, then section 5 makes applicable *any* law of the United States bearing on that subject, and such a law is found in the act of 1891.

This conclusion is not in the least weakened by the transfer of jurisdiction over future causes of this nature from the territorial courts to the district court created by section 86, the territorial supreme court having been given, by section 10, the right to carry such causes then pending to final judgment and execution.

Respondents' construction of the clause of section 86 which attempts to cover *all classes of appeals* is not tenable. The conclusive reply is that it does not cover the class petitioner's appeal comes under.

Respondents say that "there is a specific provision in the act, that in matters of appeal the supreme court of Hawaii is to be 'governed' by the laws of the United States in regard to appeals from the supreme courts of the States" (page 12 of brief).

We submit that a most casual reading of the clause of sec-

tion 86 referred to will show the error of the statement. The modifying word of the provision is "such," and it is entirely overlooked in respondents' argument. The clause reads:

"The laws of the United States governing appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in *such* matters and proceedings, as between the courts of the United States and the courts of the Territory of Hawaii."

How can *these* laws referred to "govern" in a matter and proceeding which cannot arise between a Federal and a State court? The particular matter and proceeding we present is not within the purview of the laws referred to, nor, for reasons stated in our argument accompanying this petition, is there any implied repeal of *the* law (act of 1891) within whose purview this matter and proceeding does come.

The contention is made (page 15 of respondents' brief) that the judicial system provided by this act is an "exclusive system," and in this we are inclined to agree with the respondents, but we cannot admit that section 86 alone is to be looked to as establishing such system.

The relevant sections of the act of 1891 are engrafted into this system by section 5 of the act of 1900, unless it can be said that they are "locally inapplicable."

If any reply were needed to the contention that a statute providing for an appeal in an admiralty cause from the final decree of the supreme court of the Territory of Hawaii is "locally inapplicable," it is found in the argument of the subcommittee on the judiciary, cited at pages 7 and 8 of the respondents' brief, and we submit that in answer to such contention of respondents we can with propriety adopt and apply the reasoning of this committee, which doubtless led to the vesting of the exclusive admiralty jurisdiction in a *local* Federal court, thereby permitting appeals from the

final decrees of such court to a "continental" circuit court of appeals.

If the physical situation of the Territory of Hawaii were such as to make it *impossible* for maritime matters to arise within its boundaries, then a Federal statute relating to such matters might well be said to be "locally inapplicable."

In United States *vs.* American Bell Telephone Company (159 U. S., 551) it was held:

> "Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any statute claimed to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve, and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

The court then said that the judiciary act of 1891, "well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies," but that the act did not make final, in the circuit court of appeals, a case in which the United States sued in the circuit court to cancel a patent for an invention, although by section six of the same act the decree of the circuit court of appeals was made final "in all cases arising under the patent laws."

This conclusion was based on the provision in the last paragraph of section six that "in all cases not hereinbefore in this section made final, there shall be, of right, an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." And the court held, speaking by Mr. Chief Justice Fuller:

"Judgments or decrees in cases in which the ground of jurisdiction of the circuit court is that the United States are plaintiffs or petitioners *are not made final in terms*, and such cases would fall within the last paragraph, unless restricted by the previous enumeration." * * *

"The motion may be disposed of upon the inquiry whether it was *manifestly the intention* of Congress to include such a case as that before us in the words 'arising under the patent laws.' * * * We are of opinion that it is reasonable to assume that the attention of Congress was directed to this class of cases" [actions and suits for infringements, &c.] "and that the language was used as applicable only to them; and that there is nothing in the objects sought to be attained and the mischiefs sought to be remedied by the act which furnishes foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction of this court in a case such as this."

To the same effect are cited:

Petri *vs.* Commercial National Bank, 142 U. S., 644.
Brewer's Lessee *vs.* Blougher, 14 Peters, 178.
Reiche *vs.* Smythe, 13 Wall., 162.
Washington Market Co. *vs.* Hoffman, 101 U. S., 112.

We submit that the case just considered is a perfect analogy to the one at bar. In the pending case, as in that, there was general legislation, giving the right of appeal. In this case such appeal is from the supreme court of an organized territory to the circuit court of appeals, in a case made final in the circuit court of appeals, viz: an admiralty case. Therefore there can be no presumption against the jurisdiction on appeal.

Furthermore, admiralty causes pending in the supreme court of the Republic when the act of 1900 became effective "are not made final in terms" in that court, and full effect must therefore be given to the general provision of law granting the right of appeal.

Furthermore, we are to examine the statute claimed to limit such jurisdiction in the light of the objects of its en-

actment, and it is not difficult to do so. If there is any one object of the act of 1900 organizing the Territory that stands out more boldly than another it is the evident intention to divorce the jurisdiction in matters of ordinary local concern from those of usual Federal cognizance, and particularly to retain in the constitutional courts of the United States final jurisdiction in admiralty causes.

We are indebted to counsel for the respondents for presenting to the court most conclusive evidence of this fact, in the quotation from the report of the Hawaiian Commission referred to above. But we are unable to see how that report, upon which Congress acted in passing the act of 1900, and which found great advantage in "transferring all jurisdiction of a Federal nature to a district court of the United States to be established for the Territory of Hawaii," upholds the contention of the respondents that jurisdiction of that nature, already vested by the general legislation of 1891, should be confined to and should end in a court expressly recommended and established for the final determination of "all cases of a local nature."

On the contrary, admiralty causes are specially mentioned as the most conspicuous class of cases "which make this separation of jurisdictions desirable," and the report particularly says of admiralty causes:

> "It is obviously very desirable that jurisdiction over such cases should be exercised by Federal judges."

There can be no doubt that Congress intended that after the act of 1900 became effective all cases of a Federal nature might be finally decided in a constitutional court of the United States, either in this court, by appeal or writ of error from the supreme court of the Territory as from a State court, or in the circuit court of appeals under the legislation already existing in the act of 1891, or by appeal from the district court, as provided by the act of 1900. And such being the evident legislative intention, the operation of the

act of 1900, in so far as the language of section 10, taken by itself, might be claimed to vest final jurisdiction in that court as to pending cases, "must be restrained within narrower limits than its words import."

But the application of the act of 1891 does not, as contended, establish, by any part, a *separate* judicial system from that provided by the act of 1900. The application of the former act is of interest only to that limited and peculiar class of cases which, by section 10 of the latter act, the supreme court of the Territory is given power to pass to final judgment. And we submit that the order of this honorable court of April 15, 1901, attaching the Territory of Hawaii to the circuit court of appeals for the ninth circuit under *section 15 of the act of 1891* is one affecting *solely* final decrees in those causes, where, by virtue of the order of the President of the United States, made in pursuance of the authority granted by the joint resolution of July 7, 1898, the transition period court of the Hawaiian islands was given jurisdiction which ceased as to causes of the same nature brought after the act of 1900 went into effect. We cannot interpret this order of assignment to mean *more* than this, for the classes of cases reached by the statute under which the order was made are such as at this time are within the exclusive jurisdiction of the district court and are appealable from such court to the circuit court of appeals for the ninth circuit by virtue of section 86 of the act and not by virtue of the order of assignment of this court.

In conclusion, we submit that the inference to be drawn from the argument of the respondents that the supreme court of a State has neither admiralty jurisdiction nor right of appeal to a circuit court of appeals is not pertinent here, for we have shown clearly that the supreme court of the organized Territory of Hawaii *had* admiralty jurisdiction and power to render a final decree at a time when, by statute, an appeal lay from such decree to a circuit court of appeals.

## III.

### ANTECEDENT STEPS OF APPEAL.

And this brings us to a discussion of the next point raised by the respondents in opposition to the issuance of the writ, namely:

"No appeal lay in any event to the circuit court of appeals for the ninth circuit at the time when notice of appeal was given after the final decree of the Hawaiian court. At that time Hawaii had not been assigned by this court to that circuit" (page 27 of brief).

We believe counsel to be in error in stating that "the present application is not for a writ commanding the circuit court of appeals to allow an appeal" (page 27 of brief).

Paragraph 12 of the petition reads in part as follows:

"That thereafter your petitioner, by its attorneys, presented said stipulation and bond and *petition for appeal* to the said United States circuit court of appeals for the ninth circuit, *and moved for allowance of an appeal.* * * * Whereupon on, to wit, April 1, 1901, said court denied said motion, holding that it was without jurisdiction to entertain said appeal." * * *

Paragraph 20 reads in part as follows:

"Your petitioner further avers that there is * * * substantial error * * * in the opinion and order of said United States circuit court of appeals for the ninth circuit denying said petition and *motion for allowance of appeal.*" * * *

Paragraph 21 reads in part as follows:

"That owing to the refusal of said United States circuit court of appeals for the ninth circuit *to take jurisdiction of said cause* * * *."

The parts of the prayer relevant to the point are as follows:

"And therefore your petitioner further humbly prays that a writ of mandamus in due form may issue herein, directed to the said United States circuit court of appeals for the ninth circuit and to the honorable judges thereof, * * * commanding and enjoining them to set aside said order of said court, * * * denying said petition and motion for *allowance of appeal* of your petitioner as appellant therein, and to entertain said cause, * * * and to hear and decide the same on its merits, and for such other and further relief," &c.

The *order* above referred to is one denying a petition and motion "*for allowance of an appeal*" (page 26 of petition).

We submit that the foregoing shows clearly that this *is* a petition for a writ commanding *the allowance of an appeal.* Petitioner's appeal to the circuit court of appeals for the ninth circuit was and is a continuing appeal, as were all the antecedent steps necessary to its accomplishment, and respondents' refusal to allow the appeal is a continuing refusal.

If, however, this latter statement were arguable, then petitioner's additional evidence, offered to this court on the return of the rule to show cause, showing that *since* the order assigning the Territory of Hawaii to the ninth circuit, to wit, on the 3d day of May, 1901, the allowance of its appeal was again denied, is conclusive on this point.

Assuming that the respondents can rightfully raise in this proceeding a question touching the validity of the antecedent steps of our appeal, when the irregularity, *if it exists at all,* was certainly waived by the *appellees* in entering into the stipulation as to an appeal bond (page 15 of petition), we ask this court, if it sees any merit in this showing of cause, yet finds virtue in our petition, in the exercise of justice, to issue a special *nunc pro tunc* order as of date June 15, 1900, as prayed for in said petition. Through no fault of petitioner does there exist any irregularity in the antecedent steps of its appeal.

That provision in section 15 of the act of 1891 which declares in what cases the circuit court of appeals shall have appellate jurisdiction is jurisdictional. The further provision in the same section as to the assignment of territories to the various judicial circuits "is but modal and formal."

Ayers *vs.* Watson, 113 U. S., 594.

Where the statutory provision is of the latter class, even the mistakes of an appellant are excused.

Davis *vs.* Wakelee, 156 U. S., 680.

Powers *vs.* Chesapeake and Ohio R. R. Co., 169 U. S., 92, and cases cited.

In the present case there has been no omission or laches on the part of the appellant, and it has in good faith performed every duty which lay upon it in its effort to avail itself of the right of appeal granted by statute.

"While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction."

Mutual Life Ins. Co. *vs.* Phinney, 178 U. S., 337.

## IV.

### MANDAMUS THE PROPER REMEDY.

We come now to a discussion of the last point raised in respondents' brief, and set forth in the fourth paragraph of the respondents' return, namely, that "the determination by the circuit court of appeals of the ninth circuit, that it had no jurisdiction of this appeal, was a judicial determination which cannot be reviewed by mandamus" (page 29 of brief). Or, as put in the return:

"That the said circuit court of appeals properly decided on the facts set out in the said petition that said court had no jurisdiction to proceed in the said matter and that its decision and order in the said matter constituted a final judgment therein which is properly subject to review by this honorable court by writ of certiorari" (page 2 of return).

Our sufficient reply to this contention is, that a writ of certiorari brings up the whole record of the case to the higher tribunal for review. In the present matter there is no such record in the circuit court of appeals for the ninth circuit, for the obvious reason that the door of that court has been closed against its admission. Petitioner was never in that court, except for the sole purpose of presenting and asking that its appeal be allowed. We submitted to the court our motion, the court heard it, and issued its order of denial. The petitioner, with its record, is still at the threshold seeking admission.

In this case the order does not *dismiss*, but *denies* an appeal. In brief, the court refuses to take jurisdiction, when by law it should, and the fact that it has given its interpretation of the law is not conclusive of what the law is.

Every wrongful refusal of a lower court *to allow an appeal* is a judicial *interpretation* of the law for which the remedy is by mandamus alone.

The cases cited by respondents are not in point; for in each of them the case and its subject-matter was actually pending before the court, and the action complained of was (to use the language of this court in *Ex parte* Nininger, 150 U. S., 150, cited by the respondents) "had in the exercise of legitimate jurisdiction" of such court.

In the present case action was not had "in the exercise of legitimate jurisdiction" of the court, but the court *refused* to exercise the legitimate jurisdiction conferred upon it by statute.

The principle governing the issue of writs of mandamus by this court under the present circumstances is stated in

the cases cited in our original brief in support of the petition. The following additional cases are to the same effect:

"The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions; but mandamus only lies, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error."

*Re* Atlantic City R. R. Co., 164 U. S., 635.
*Re* Hohorst, 150 U. S., 653.

In the present case no writ of error lies, nor is there any other adequate remedy. The following language of this court is therefore particularly in point:

"This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right without any existing legal remedy. * * * Without, therefore, the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of any redress."

*Ex parte* Bradley, 7 Wall., 364.

For the reasons advanced herein and in the argument accompanying the petition, we respectfully submit that cause has not been shown, and that the writ should issue as prayed for.

Respectfully submitted.

DUANE E. FOX,
NATHAN H. FRANK,
KINNEY, BALLOU & MCCLANAHAN,
*Attorneys for The Wilder's Steamship Company, Petitioner.*

Office Supreme Court U. S.
FILED
MAY 13 1901
JAMES H. McKENNEY
Clerk.

# Supreme Court of the United States.

**OCTOBER TERM, 1900.**

*No. 18, Original.*

*EX PARTE:* IN THE MATTER OF THE PETITION OF THE WILDER'S STEAMSHIP COMPANY FOR WRIT OF MANDAMUS

vs.

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLES WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, JUDGES THEREOF, RESPONDENTS.

## Motion for Leave to File Additional Evidence.

Now comes the petitioner herein and shows that, since it filed its petition for mandamus in this Court, this Court has, by order regularly made on April 15, 1901, assigned the Territory of Hawaii to the Ninth Judicial Circuit, and on the same day ordered that a rule to show cause issue herein.

And that thereafter, to wit, on May 3, 1901, this petitioner did present to the Circuit Court of Appeals for said Ninth Judicial Circuit a further petition for allowance of appeal

FILED
MAY 13 1901
JAMES H. McKENNEY,
Clerk

9 ~~10~~ Orig.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

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WILDER'S STEAMSHIP COMPANY, A HAWAIIAN CORPORATION, AND THE STEAMSHIP "CLAUDINE," LIBELEES AND APPELLANTS,

*vs.*

GEORGE U. HIND, C. A. SPRECKELS, RUDOLPH SPRECKELS, G. WEMPE, WILLIAM CARSON, H. D. BENDIXEN, JAMES H. NELSON, M. C. SIVERSON, N. J. McLEOD, G. M. FAGERLUND, J. S. HELLIGEN, JOHN PILTZ, AND HENRY M. WETHERBEE, LIBELLANTS AND APPELLEES.

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*To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:*

The petition of Wilder's Steamship Company, the libelee and appellant herein, respectfully shows as follows:

I.

That on the 5th day of February, A. D. 1900, the above-named libellants filed a libel in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii against the above-named libelee, in a cause civil and maritime to re-

cover the sum of Sixty-four Thousand (64,000) Dollars, for damages alleged to be due the libellants from the libelees, as by reference to said libel will more fully appear.

II.

That thereafter on the 5th day of March, A. D. 1900, the said Wilder's Steamship Company duly appeared and filed its answer to said libel, praying that the said libel be dismissed with costs, as by reference to said answer will more fully appear.

III.

That while said cause was pending in said Circuit Court for the First Judicial Circuit of the Territory of Hawaii, namely, April 30th, A. D. 1900, a certain Act of the Congress of the United States was passed and approved, entitled "An Act to provide a Government for the Territory of Hawaii," and said Act by the terms thereof took effect forty-five days from and after the approval thereof, to wit: on June 15th, A. D. 1900.

IV.

That thereafter after the passage of said Act of Congress but before it took effect, said cause came on regularly to be heard, and on the 7th day of May, 1900, a decree was rendered in said cause against the said Wilder's Steamship Company in the sum of Fifty-five Thousand (55,000) Dollars, from which decree the said Wilder's Steamship Company made and perfected its appeal to the Supreme Court of the Territory of Hawaii, as provided by the then existing law of said Territory.

V.

That thereafter said cause on appeal came on regularly to be heard before the Supreme Court of the Territory of

Hawaii, and on the 25th day of October, A. D. 1900, said Supreme Court rendered its decision in said cause, awarding damages against the said Wilder's Steamship Company in the sum of Fifty-four Thousand Six hundred and thirty and $\frac{75}{100}$ (54,630.75) Dollars.

VI.

That in accordance with said decision a final decree of said Supreme Court was made and entered on the 9th day of November, A. D. 1900.

VII.

That thereafter on said 9th day of November, A. D. 1900, the said Wilder's Steamship Company gave due notice of its intention to appeal said cause to the United States Circuit Court of Appeals for the Ninth Circuit, and upon said day duly filed with said Supreme Court its notice of appeal and assignment of errors.

VIII.

That on Monday, the 15th day of April, 1901, it was ordered by the Supreme Court of the United States that the Territory of Hawaii be and it is hereby assigned to the Ninth Judicial Circuit, under section 15 of the Judiciary Act of March 3rd, 1891.

IX.

That the above-named libelee and appellant the Wilder's Steamship Company is advised and insists that said final decree of said Supreme Court of the Territory of Hawaii is erroneous, and for this reason it does appeal from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit, and on said appeal intends to seek a new decision on the law and the facts, upon the pleadings and proofs in said Supreme Court, and upon new pleadings and

proofs to be introduced in this Court, and prays that the record and proceedings aforesaid may be returned to the United States Circuit Court of Appeals for the Ninth Circuit, and that said decree may be reversed, and the libelants herein be decreed to pay the costs of the libelee in the said Territorial Courts and in this Court.

Wherefore, the said Wilder's Steamship Company respectfully petitions this Honorable Court for an allowance of its said appeal from the said final decree of the Supreme Court of the Territory of Hawaii made and entered on the 9th day of November, A. D. 1900.

Dated, San Francisco, May 3rd, A. D. 1901.

KINNEY, BALLOU & MCCLANAHAN,
NATHAN H. FRANK,
*Proctors for Libelee and Appellant.*

The foregoing application for the allowance of an appeal is hereby denied and said appeal disallowed.

Dated, May 3d, 1901.

WM. B. GILBERT,
ERSKINE M. ROSS,
WM. W. MORROW,
*Judges, Circuit Court of Appeals,*
*Ninth Judicial Circuit.*

(Endorsed:) Petition for Appeal to United States Circuit Court of Appeals for the Ninth Circuit and Order Denying Same. Filed May 3, 1901. F. D. Monckton, Clerk.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true and correct copy of a "Petition for Appeal to United States Circuit Court of Appeals for the Ninth Circuit and Order Denying Same," this day filed in the cause entitled The Wilder's Steamship Company (An Hawaiian Corporation), Appellant, *vs.* George U. Hind *et al.*,

No. 662, as the original thereof remains of record in my office.

Attest my hand and the seal of said Circuit Court of Appeals at San Francisco, California, this 3rd day of May, A. D. 1901.

{ Seal United States Circuit Court of Appeals, Ninth Circuit. }

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled May 3, 1901. F. D. M., clerk. }

[Endorsed:] No. 662. U. S. Circuit Court of Appeals for the Ninth Circuit. Wilder's Steamship Co., Appellant, *vs.* George U. Hind *et al.* Certified copy of Petition for Appeal to U. S. Circuit Court of Appeals, 9th Circuit, and Order Denying Same.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 18 Original.

Ex parte: In the Matter of the Petition of THE WILDER'S STEAMSHIP COMPANY for Writ of Mandamus,

vs.

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, the Honorable WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, Judges thereof,

Respondents.

## BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT.

### Statement of the Case.

This is an application for a writ of mandamus to the Circuit Court of Appeals of the Ninth Circuit requiring it to take jurisdiction of an appeal. An action in admiralty was commenced against the petitioner here, The Wilder's Steamship Company, in February, 1900, in the Circuit Court of

Hawaii. That court rendered a decree in favor of the libellants and against this petitioner on the 7th day of May, 1900, and before the act providing a government for the Territory of Hawaii (Act of April 30, 1900) went into effect. An appeal was taken on the same day to the Supreme Court of Hawaii. On the 9th day of November following, and after the territorial government act had become operative, the latter court entered a final decree, modifying in some respects the decree of the lower court, but still in favor of the libellants. The petitioner here now claims the right of appeal to the Circuit Court of Appeals for the Ninth Circuit. Neither that court, however, nor the Supreme Court of Hawaii has recognized this right; and the Circuit Court of Appeals has expressly refused to entertain the appeal. An order upon the latter court to show cause why this writ should not be granted has issued from this Court. In response to this order and in support of the refusal of the Circuit Court of Appeals to entertain this appeal, we offer the following argument.

## Argument.

The question presented is entirely one of statutory construction. The right to the appeal is claimed under Section 15 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals (26 Stats. at L. 826). This section in connection with Sections 5 and 6 of the same act gives to the Circuit Courts of Appeals appellate jurisdiction over the "Supreme Courts of the several territories" in certain cases. Among these cases are cases in admiralty. It is claimed that these provisions of the act have been extended to Hawaii by the organic act providing a government for this territory (Act of April 30, 1900). That they have no application has been held by the Supreme Court of Hawaii,

and the same conclusion was reached by the Circuit Court of Appeals for the Ninth Circuit in the opinion incorporated in the petition for this writ. We shall summarize the considerations which seem to us to lead irresistibly to the conclusion reached by both of these courts. And we wish to answer a little more in detail that particular argument advanced in support of this application which is based on the peculiar character of this individual case as one in admiralty, a case, therefore, which cannot in future arise in the Hawaiian territorial court proper and never could arise in a state court. As was said by the Circuit Court of Appeals in its opinion refusing to allow the appeal: "The fact that the present case is a suit in admi-
"ralty, and as such would have been within the jurisdiction
"of the District Court created by the act if it had been com-
"menced after the date when the act went into effect, cannot
"affect the question which is before us. The case is purely
"one of the construction of the terms of the act." (Pet. for Writ, p. 25.) But the argument that the case is in any sense a peculiar one, or one not provided for by the terms of the organic act, and that to allow it to be finally determined by the territorial court would be to permit an anomaly which should be avoided if possible as not contemplated by Congress and as inconsistent with the act itself, is, we believe, altogether unsound. We shall give our reasons for this belief after stating briefly the considerations which must in any event govern the decision of this question as a matter of statutory construction.

## I.

**Under the provisions of the Hawaiian Territorial Government Act, the Supreme Court of Hawaii, though in name the Supreme Court of a territory, must be treated for the purpose of determining the right of appeal, as the Supreme Court of a state. Statutory provisions in regard to appeals from the Supreme Court of a territory are not applicable to appeals from this Court. It is so in terms provided in the act, and, in addition, this provision is in harmony with the other provisions of the act, and with local conditions.**

In determining the question whether the laws of the United States in regard to appeals from territorial courts apply to the courts of Hawaii, we shall be called upon to construe various provisions of the organic act. To a clear understanding of the act, a brief summary of the history of the legislation in regard to Hawaii will be necessary.

> "Even in construing the terms of a statute, courts must take notice of the history of legislation and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions, and, therefore, most likely to have been the construction intended by the law-making power."
>
> *Texas etc. Ry. Co.* vs. *Interstate Commerce Commission*, 162 U. S. 197, 218.
>
> "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."
>
> *United States* vs. *Union Pacific R. R. Co.*, 91 U. S. 72, 79.

On July 7, 1898, the date of the passage of the joint resolution annexing the Hawaiian Islands, there was in the islands a fully organized republican government, with institutions and laws kindred to our own. The judicial sys-

tem consisted of courts of original and appellate jurisdiction whose powers were defined by a constitution and body of statute laws. The court of general original jurisdiction was called the Circuit Court, and to it was also entrusted jurisdiction over admiralty causes. (Const. Rep. Haw., Articles 82-86; Ballou, Civil Laws of Hawaii, Chap. 80, Secs. 1135, 1136, 1145; Chap. 81, Secs. 1162, 1164; Chap. 92, Sec. 1433.) In such matters, as in other matters, an appeal lay to the court of last resort, or Supreme Court, whose decrees by express provision of the constitution were made "final and conclusive". (Const. Rep. Haw., Art. 86.)

By the joint resolution of Congress and the order of the President made in pursuance of the authority therein conferred upon him, the municipal law of the islands was expressly retained in force and all the officers of the existing government, including the judicial officers, were directed to continue to exercise the same powers with which they were already clothed (30 Stats. at L. 750; Letter of the Sec'y of State to Hon. Harold M. Sewall, July 8, 1898; see report of the Committee on Territories, 56th Cong. 1st Session, House of Rep., Report No. 305, p. 3).

The joint resolution contained the following clauses:

> "Until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies thus occasioned.
>
> "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of*

> *the Hawaiian Islands*, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, *shall remain in force until the Congress of the United States shall otherwise determine.*"
> 30 Stats. at L. 750.

The order of the President was as follows:

> " In the exercise of the power thus conferred upon him by the joint resolution, the President hereby *directs that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty*, subject to his power to remove such officers and to fill the vacancies."
> Letter of the Sec'y of State, *supra.*

Until the organic act went into effect nearly two years later the law thus declared remained the law of these islands.

In pursuance of the duty imposed upon him by the joint resolution, the President appointed five commissioners to recommend to Congress such legislation in regard to Hawaii as they should deem necessary. This commission subdivided itself into committees and framed a proposed territorial government act. The sections of this act dealing with the judiciary provided for the continuance of the existing judicial system and that the laws providing for the jurisdiction of such courts should "continue in force" except as otherwise provided in the proposed act. They made provision also, however, for a court, to be called the District Court, upon which was to be conferred the same jurisdiction exercised by the Circuit and District Courts of the United States, the jurisdiction of the other courts, called by the act "territorial courts", to be to that extent limited. There followed this provision:

> " The laws of the United States relating to appeals,

writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

Report of the Hawaiian Commission, Wash. 1898, p. 40.

In regard to this judicial system, the special committee on the judiciary said in its sub-report:

"Hawaii having been hitherto a single independent state, its courts have exercised much of the jurisdiction exercised by both the federal and state courts in this country. In this respect the Hawaiian courts have resembled somewhat the courts of the territories of the United States, which, as a rule, have had much federal jurisdiction, as well as jurisdiction of cases arising under the territorial laws. It seems very desirable in the case of Hawaii to separate these jurisdictions, leaving all cases arising under the laws of the territory to the territorial courts and transferring all jurisdiction of a federal nature to a District Court of the United States to be established for the Territory of Hawaii. This District Court should have, also, the jurisdiction of a Circuit Court of the United States.

"There are many reasons which make this separation of jurisdictions desirable. The foreign shipping already calling at the ports of Hawaii, as well as the shipping from the United States, is very extensive and is rapidly increasing. With the natural growth of commerce on the Pacific, and especially in view of the change in the ownership of the Philippines, the near completion of the Siberian Railway, and the projected Nicaraguan Canal, the shipping that will call at the Hawaiian Islands will undoubtedly increase more rapidly in the future than it has increased in the past. This will give rise to many important admiralty cases in Hawaii, some of which may become matters of international interest.

"It is obviously very desirable that jurisdiction over such cases should be exercised by federal judges. Again, in the event of war, Hawaii may become a center for the trial of prize cases, of which the federal courts

> should have exclusive jurisdiction. By making the relations between the territorial courts of Hawaii and the federal courts, as to appeals, removal of causes, etc., the same as the corresponding relations between the state and federal courts, *all cases of a local nature can be tried and determined finally in the islands, and thus the expense and delay of bringing such cases to the mainland, and possibly to Washington, a distance of 5,000 miles, will be avoided.*"
> Rep. Haw. Com. p. 162.

One of the committee making this report was the Honorable W. F. Frear, who is now the Chief Justice of the Supreme Court of the territory and the writer of the opinion rendered by that Court in the case at bar. This report was incorporated into the report of the Committee on Territories of the House of Representatives to which was referred the bill (56th Cong., 1st session, House of Rep., Report No. 305, p. 20). The act was passed, so far, at any rate, as regards the provisions for the judicial system, substantially in the form in which it was thus presented; and the identical language above quoted in regard to the law governing appeals and writs of error from the territorial courts became a portion of Section 86 of the act as it was made a law. The act was approved April 30, 1900, and became operative on June 15th following.

This provision of Section 86 which we have thus quoted and which was referred to by the judiciary committee of this commission in that portion of its report which we have given, taken in connection with Section 81, to which we shall later refer more particularly and which "continues in force" the final jurisdiction of the Supreme Court except as otherwise provided, plays an important, and indeed to our minds a controlling, part, in the controversy over the right to appeal now claimed. An admiralty case does not belong

to the class of cases in which the United States courts have any supervision over the state courts; nor does any appeal whatever lie from the Supreme Court of a state to a Circuit Court of Appeals. But it is claimed that, nevertheless, the Supreme Court of Hawaii, being the Supreme Court of a territory, is affected by those laws of the United States which provide for appeals from the Supreme Courts of territories, and among them, of course, the act establishing Circuit Courts of Appeals. As appears from the opinion of the Supreme Court of Hawaii, in this case, this claim was boldly rested before that court on the very provision of Section 86 which we have quoted. It was claimed that the word "states" was used in that clause in a sort of generic sense and included "territories", and that therefore by Section 86 itself the courts of Hawaii were made to bear the same relation to the federal courts which both the state and the territorial courts bear. This construction is, however, certainly unnecessary and unnatural. It is perhaps superfluous to cite authority to the point that the word "state" is, under certain circumstances at any rate, to be construed in its narrow sense. Illustrative cases are, however:

*Hepburn* vs. *Ellzey*, 2 Cr. 445, 452;
*New Orleans* vs. *Winter*, 1 Wheat. 91, 94;
*Scott* vs. *Jones*, 5 How. 343, 377.

That in the statute under consideration here the word is to be so construed, is all but self-apparent. We are entirely content to leave that point where it is left by the opinion of the Supreme Court of Hawaii. The reasoning of that court on this subject is indeed unanswerable and seems to have been accepted as conclusive by the petitioner here, for we understand that it is now conceded that the word "state" must be given its strict meaning in this section. The basis

of the argument now made in support of this claim to a right of appeal, as from the Supreme Court of the territory, is found elsewhere than in Section 86; and that section is conceded to be rather an obstacle than an aid in the establishment of the right. We are to consider, then, whether, *in spite of this clause*, the laws of the United States in regard to appeals from the Supreme Courts of territories are applicable to the Supreme Court of Hawaii.

That Hawaii is a territory of the United States is, of course, unquestioned; but that fact alone does not make the provisions of the Circuit Court of Appeals Act in regard to the Supreme Courts of territories applicable. As we have seen, until the organic act went into effect, there was no statute of the United States which had any operation in Hawaii. Until that time Hawaii did not become an organized territory. Its law was its own municipal law and the joint resolution which expressly retained that law in force. At any rate, then, during that period no appeal lay to any court from the decisions of the Supreme Court of Hawaii; nor do we understand that it is now claimed that there was then any right of appeal. Moreover, no statute giving an appeal has become applicable except by virtue of some act of Congress making it so; and no statutes of the United States have in fact ever been extended to Hawaii except in so far as they are so extended by Section 5 of the organic act. This section provides

> "that the Constitution, and *except as herein otherwise provided*, all the laws of the United States which *are not locally inapplicable*, shall have the same force and effect within the said territory as elsewhere in the United States".
>
> Act of April 30, 1900.

The laws of the United States in regard to appeals from

territorial courts are applicable to Hawaii, then, only in case it is not "otherwise provided" in the organic act, and in case those laws are not "locally inapplicable". That it is, however, "otherwise provided" in this act and that these laws, including the provisions of the Circuit Court of Appeals Act in question, are "locally inapplicable", we believe for the following reasons to be clear.

The matter of appeals from the Supreme Courts of territories is regulated by the Circuit Court of Appeals Act and the Revised Statutes. The former provides for appeals in certain specified cases to the appropriate Circuit Court of Appeals. In all other cases in which the amount in controversy exceeds five thousand dollars, an appeal lies to the Supreme Court of the United States.

*26 Stats. at L.*, 826;
*Rev. Stats.*, Sec. 702;
*23 Stats. at L.*, 443;
*Simms* vs. *Simms*, 175 U. S. 162;
*Folsom* vs. *U. S.*, 160 U. S. 121;
*Aztec Min. Co.* vs. *Ripley*, 151 U. S. 79;
*Shute* vs. *Keyser*, 149 U. S. 649.

The relation thus established between the Supreme Courts of territories and the courts of the United States is, of course, widely different from the relation between the Supreme Courts of the various states and the courts of the United States. The courts of original jurisdiction in the states are connected with the United States courts by virtue of the statutory provisions in regard to removal of causes. These provisions are not applicable to courts of original jurisdiction in the territories.

*McCornick* vs. *Western Union Tel. Co.*, 79 Fed. 449.

The Circuit Court of Appeals and the Supreme Court of the United States have a general appellate jurisdiction over

the Supreme Courts of the territories. The state Supreme Courts have on the other hand no direct connection whatever with the Circuit Court of Appeals; and the control over them exercised by the United States Supreme Court is only the limited control given by Section 709 of the Revised Statutes. Can it be said, then, that an act which declares that the relation between the territorial courts of Hawaii and the courts of the United States shall be that of the state courts to the courts of the United States, does not " provide otherwise" than that the laws in regard to appeals from the Supreme Court of a territory to the courts of the United States shall be extended to the Hawaiian courts? We may quote again the clause of Section 86, to which we have already referred. It is as follows:

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states *shall govern* in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

There is a specific provision in the Act, then, that in matters of appeal the Supreme Court of Hawaii is to be "governed" by the provisions of the laws of the United States in regard to appeals from the Supreme Courts of the states. To declare that it is "governed" by those laws is necessarily to exclude the supposition that it is "governed" by the laws in regard to appeals from the Supreme Courts of the territories. A court is not "governed" in matters of appeal by the statute in regard to appeals from state courts, if an appeal is to be allowed which never could be taken from a state court. To declare that a certain law in regard to appeals shall "govern" is to provide, not only that the appeals given by that law shall be allowed, but it is

necessarily to declare also that there shall be no other appeals.

We reach the same conclusion if we apply the other test and seek to ascertain whether these laws are "locally inapplicable". The Hawaiian Islands form a populous and wealthy community and have for generations constituted an independent and sovereign state. They are situated two thousand miles from the mainland and five thousand miles from the capital of the nation. Can that law be said to be "locally applicable" which, in every civil action involving more than five thousand dollars, would give a right of appeal from the final decree of the Supreme Court of these islands to the Supreme Court at Washington?

Though in name a territory, Hawaii stands both historically and legally on a very different footing toward the general government from that occupied by the continental territories. By the organic act a dual system of courts is established as in the various states, and there is no true analogy between the so-called territorial courts of these islands and the courts of the continental territories. It is specially provided that these courts shall bear the same relation to the United States courts in regard to removal of causes and appeals that the courts of the various states of the United States do to their respective federal courts. A statute would not be "locally applicable" which would ingraft on this system, complete as it is and applied to the very locality by name, provisions applicable only to courts constituting a totally different system, which system was devised long before Congress had even thought of the possibility of having to provide government for territories beyond seas.

It is urged, however, that we should apply here those rules of construction which are applicable to the construction

of statutes *in pari materia*; and the doctrine that implied repeals are not favored, is invoked. It is said that the Circuit Court of Appeals Act is not necessarily inconsistent with Sections 81 and 86 of the organic act; and the conclusion is drawn that they should both be allowed to stand. We do not by any means concede that these provisions are not inconsistent. In fact, the contrary seems to us obviously the fact; but we are not called upon to rest our argument on that point. If this statute had said merely that appeals shall be allowed in certain cases, and that all other laws of the United States shall be applicable, questions in regard to the construction of statutes *in pari materia* might become relevant, and it could be urged with propriety that appeals given by other statutes should also be allowed. Or if the acts giving appellate jurisdiction to the Supreme Court of the United States and the Circuit Court of Appeals had been applicable to the Hawaiian court before the passage of the organic act, discussion of the limitations on implied repeals would have some significance. But we are called upon here neither to determine whether there is an implied repeal, nor to construe acts *in pari materia*. We are simply to determine what statutes of the United States have been by Congress extended to Hawaii. Taking the two provisions—that in matters of appeal from the territorial Supreme Court the statutes giving appeals from the state Supreme Courts shall "govern", and that where it is in the act "otherwise provided" or where the laws of the United States are "locally inapplicable" they shall not be extended to Hawaii—we are necessarily driven to the conclusion that the provisions of the statutes of the United States in regard to appeals from the Supreme Courts of territories never became applicable to this territory at all, and were therefore never

the subject of an implied repeal and never became enactments *in pari materia* with the organic act.

Suppose, however, that we are called on to apply the canons of construction which are invoked on behalf of the party seeking to maintain this appeal. Suppose it were true that this court was, prior to the organic act, the Supreme Court of a territory, and that appeals from its decisions could be taken to the Supreme Court of the United States and to the Circuit Court of Appeals, nevertheless there would be still conclusive reasons for the construction of this act, which would now shut the Supreme Court of the territory off from such an appeal. As we have seen, the act bears on its face the evidence that the system established is an exclusive system. It necessarily then repeals so far as Hawaii is concerned any statute establishing a different system. To say that for purposes of appeal the Supreme Court of Hawaii can be treated both as the Supreme Court of a state and the Supreme Court of a territory, is much the same as saying that a thing shall be black and white at the same time. The systems are necessarily inharmonious and cannot both stand. The last enactment must prevail. Again, if the provisions in regard to appeals from continental territorial courts were intended to be still applicable, there would be an irreconcilable conflict in the act itself. For we should have in that case, under this act in effect two Supreme Courts in Hawaii, each, that is to say, supreme in its own jurisdiction, the "Supreme Court" proper, and the federal court or so-called "District Court". In the case of *Coquitlam* vs. *United States*, 163 U. S. 346, this Court said that the so-called "District Court" of Alaska was "the court of last " resort, within the limits of that territory" and "therefore, " in every substantial sense, the Supreme Court of that

" territory." The Court continued (p. 352):

> "The title of the territorial court is not so material as its character. Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper circuit court of appeals, leaving to this court the assignment of the respective territories among the existing circuits."

Under the organic act in Hawaii the Supreme Court proper and the District Court is each in its own sphere the court of last resort within the limits of the territory. If the statutory provisions, then, in regard to appeals from the Supreme Courts of territories are applicable to the Supreme Court proper, they must be just as applicable to the District Court; and in addition to the appeals from that court to the Circuit Court of Appeals provided for by Section 86 of the act, we have all the appeals which could be taken if that, too, were the Supreme Court of a territory.

And finally the anomaly would be presented that appeals and writs of error, where there is a diversity of citizenship, would go to the Court of Appeals, while in the absence of such diversity of citizenship, an exactly similar case would come to this Court on appeal or writ of error. In the one case, a single appeal would be given, in the other the right of appealing from an appellate court would be given. The foreigner would not be granted equal privileges of appeal with the citizen.

It is as impossible to believe that such was the intention of Congress, as it is to believe that Congress intended to give an appeal from the Supreme Court of Hawaii to the Supreme Court of the United States in every action in which the

amount in controversy exceeded five thousand dollars. Yet such are the consequences that follow from any line of reasoning which is based on the assumption that the Circuit Court of Appeals Act is applicable to Hawaii. If it ever had been applicable it would necessarily have been repealed, so far as Hawaii is concerned, by the organic act.

We submit, therefore, that the organic act distinctly evidences the intention of Congress to create for the Territory of Hawaii a judicial system which should be, as nearly as possible, the equivalent of the system existing in the sovereign states; that Congress has expressly provided that the laws of the United States dealing with any different system should not be applicable to Hawaii; and that even in the absence of such an express provision, under well settled rules of interpretation, this Court is required to hold that in any event those acts, otherwise applicable, which are no part of the system thus expressly created, are necessarily excluded therefrom.

## II.

**If this Court should be of the opinion that Section 86 has no application to actions pending in the courts of Hawaii at the time the organic act went into effect, such actions must be treated as governed entirely by the municipal laws then in force and no right of appeal under the general laws of the United States can in any event be claimed. The fact that it is an action of such a character that it never could be brought in a state court and is a peculiarly fit subject matter for the jurisdiction of the federal courts, affords no basis, either in law or reason, for the argument made in support of this application.**

The claim made in this case would, we venture to say,

never have been made at all, if it were not for the fact that, while under the new judicial system the territorial court becomes in its relation to the United States courts in effect a state court, this particular action is of such a character that it could never be maintained in any state court and hence seems to be outside of this judicial scheme altogether. It has seemed anomalous that it should by this turn of events be shut out from the course ordinarily followed by admiralty cases whether in the territorial courts or in the federal courts, where alone this kind of action in our judicial system is to be found. An effort has accordingly been made to give some kind of construction to the law, which, as it was thought, would remedy this seeming inconsistency.

As a matter of statutory construction, however, no comfort can be obtained from the fact that appeals in admiralty cases are not provided for in the statutes giving appeals from the decisions of the state Supreme Courts. The fact that no provision for such appeals is there made furnishes in itself no warrant for invoking some other statutory provision. The right to appeal is purely statutory. These statutes do not purport to give a general right of appeal, and the only result of a failure to mention a class is that in cases belonging to that class there is no right of appeal. Such failure affords no basis for the argument that the statute is entirely inapplicable. Congress may apportion the jurisdiction of the territorial courts in any way it pleases and allow such appeals as it sees fit. It is not for a court to supplement these provisions at its pleasure.

As was said by this Court in *Rosencrans* vs. *United States*, 165 U. S. 257, 263:

> "This may be a case of mere omission, but it is an omission which the courts cannot supply."

And again in *Folsom* vs. *United States*, 160 U. S. 121, 127 :

> "It is said that this involves the absurdity that convictions for minor offences are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, *but where the intention is plain, it is the duty of the court to expound the statute as it stands.*"

But if this consideration should lead this Court to the conclusion that Section 86 has no application to pending actions, it by no means follows that the Circuit Court of Appeals Act, as regards such actions, takes the place of that section. On the contrary there are, as we shall see, other express provisions of the organic act which then necessarily control the situation and still exclude the provisions of the Circuit Court of Appeals Act.

Upon the admission of territories into the Union as states and the replacing of the single system of territorial courts by the dual system of federal and state courts, the very situation in regard to existing actions is created which has arisen in Hawaii. The natural question has then presented itself as to the future disposition of actions then pending in the territorial courts, but of a character of which the federal courts and not the state courts would in future have jurisdiction. It is, in a way, anomalous to leave them in the state courts, and so subject only to laws in regard to procedure and appeal applicable to such courts, while newly instituted actions of the same character are brought in the federal courts and so governed by entirely different laws.

A court cannot, as we have said, look elsewhere than to the statutes themselves for the solution of the difficulty thus presented; but it is natural that the legislature itself should deal with the matter, and provide that all actions then pending in the territorial courts of the character thereafter to be entrusted to the federal courts should be removed to the latter courts. Such provisions have in fact been commonly made in the acts forming the continental territories into states.

See *Koenigsberger* vs. *Richmond Silver Mining Company*, 158 U. S. 41.

If in the present instance Congress had been as impressed as the petitioner here with the necessity of getting these cases into the federal courts, it would have been simple and natural to provide directly for it in this way. There was plenty of precedent for such action. Yet Congress, notwithstanding its previous nearly unbroken course in this respect, failed so to provide. There was, however, in this instance, another equally logical solution of the situation. Upon the admission of a territory as a state, the territorial courts necessarily cease to exist, and Congress has no power to provide that they shall retain jurisdiction of pending actions and that such actions shall be carried to conclusion under the old laws and with the old rights of appeal.

*Benner* vs. *Porter*, 9 How. 235.

In the case of Hawaii, however, where the new system as well as the old was entirely under the control of Congress, this course was open to no such objection and was a natural way out of the difficulty. If Section 86 is to be construed as not applying to pending actions, then, it seems to us clear from the other provisions of the organic act to which we

shall now refer the Court, that there is but one alternative construction to the act. Congress has not excepted such actions from the operation of Section 86 without excepting them from the operation of all laws of the United States in regard to procedure and appeal. If Section 86 does not apply, then it is clear that Congress has expressly adopted in regard to pending actions the natural course here suggested and has left *such actions subject exclusively to the old laws in regard to procedure and appeal.*

In Section 81 of the act, it is provided as follows:

> "And until the legislature shall otherwise provide, *the laws of Hawaii* heretofore in force concerning the several courts *and their jurisdiction* and procedure shall continue in force except as herein otherwise provided."

Section 83 provides

> "that the laws of Hawaii relative to the judicial department, including civil and criminal procedure, *except as amended by this act*, are continued in force subject to modification by Congress or the legislature."

Section 1 of the act provides

> "that the phrase 'the laws of Hawaii', as used in this act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii" in force August 12, 1898.

Section 10 reads in part as follows:

> "That all rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of this act, shall continue to be as effectual as if this act had not been passed. * * * All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; *all such proceedings, all actions at law, suits in equity and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii.*"

That the word "final" as ordinarily applied to judgments and decrees does not preclude, and is not inconsistent with the existence of a further right of appeal is, of course, true. But, we think it must also be conceded that a stricter meaning may in appropriate cases be given to the term. And this seems to us an eminently appropriate case for such a construction. It would be the assumption of an anomalous condition of things, were this Court to say that as to all actions ended *during* the interregnum between annexation and the passage of the organic act, the Supreme Court of Hawaii had the power to make a decree from which no appeal would lie, but that, as to decrees entered *after* the organic act was passed, the power of the court to make such decrees should cease, notwithstanding the fact that the only expression of the will of Congress on this subject is found in the clauses of that act which confirm to that court the power of final determination of causes as given to it by the Hawaiian constitution and authorize it to carry them " on to final judgment and execution". There is no reasoning, therefore, which leads to the conclusion that pending actions were excepted from the operation of section 86 which does not lead equally to the conclusion that they are excepted from the operation of the Circuit Court of Appeals Act and are to be prosecuted to final judgment in those courts, and those courts alone, in which they would have been so prosecuted to judgment if the Act had never been passed. If such actions are not governed by Section 86 it is because, and only because, they are not governed by *any* of the laws of the United States in regard to procedure and appeal but are governed exclusively by the old municipal law of Hawaii.

It is inconceivable that Congress should have intended to

grant to the limited class of pending actions rights of appeal which existed neither under the old system nor under the new. Such an intention would have to appear by the most unequivocal language before it could be credited. The actual language of the statute, however, not only admits of no such construction, but contains a clear expression of the will of Congress to the contrary. The organic act provided in terms that the jurisdiction given to the Supreme Court of Hawaii *by the Constitution* of Hawaii should "*continue in force* except as herein otherwise "provided". There is nothing in the act which "otherwise provides" except Section 86 and that section is explicit as to the jurisdiction given to the District Court, the Circuit Court of Appeals and the Supreme Court of the United States. Whatever of jurisdiction originally granted by the Constitution and laws of Hawaii to the Supreme Court of Hawaii, was not taken away by Section 86, necessarily remained in that court. Every cause which that court had the right to finally and conclusively determine under the Constitution of Hawaii, it had a like right, given to it by the organic act, to finally determine under the new act, provided it was not one of those cases apportioned to the new jurisdiction by Section 86. Actions at law and in equity, not removable by appeal or otherwise, under that section, were left for final determination to the original Hawaiian Supreme Court. The intention of the statute is apparent, not merely from the words thus shown to have been used, but also from the conditions existing at the time of the adoption of the organic act. We have seen that at the date of the passage of the joint resolution, Congress acted with reference to a fully organized government, one which, in almost all respects, was as full and complete as that of a state in our

Union. Its complete system of courts of original and appellate jurisdiction, to which had been entrusted under the old municipal law the hearing and final determination of actions of all kinds, including those represented by the case at bar, was preserved by this act. It was a system in harmony with our own institutions. It had been administered, in large part at least, by those of the same blood with ourselves. It looked to the same sources for its jurisprudence as do our own courts. For the preceding two years, during which the islands had been an integral part of our domain, its tribunals had under the expressed will of Congress and the positive direction of the President, been the sole tribunals for the administration of justice in the islands. There remained only to leave to that system, and that system alone, all pending actions, in order to bridge over completely and adequately the transition between the old system and the new.

With this reasonable construction given to the statute, the whole argument based on the peculiar character of this case as an action in admiralty falls to the ground. It may be true that the act recognizes this class of cases as being a class which in future should be entrusted to the United States courts. But it also recognizes that those courts which had theretofore been fit tribunals for their final determination, remained such as regards actions which might be then pending before them. Again it may be true that a system of appeals which treats the territorial courts as state courts is obviously framed without regard to possible admiralty causes pending in those courts. But that fact only tends to confirm that construction of the statute which leaves all provisions of the United States laws in regard to appeals altogether inapplicable to pending actions. The

omission to provide for a second appeal in an admiralty case pending in the Hawaiian court at the date of the passage of the organic act is not of itself an argument against the truth of our contention regarding the intention of that act. In *McNulty* vs. *Batta*, 10 How. 71, this Court held that on the admission of Wisconsin as a state and the creation by the state and by Congress of the dual system of courts, this Court lost jurisdiction of a cause then pending before it, of which it had gained jurisdiction by writ of error to the Supreme Court of the territory. No provicion had been made in the laws creating the new system whereby the jurisdiction should be preserved.

We may add in closing, however, that even though the new system is to go into force as regards pending actions, and apart from the fact that in any event the statute plainly denies the right of appeal which it is here sought to invoke, we cannot see that there is anything unjust or arbitrary or absurd in this limitation on the right to appeal. There is nothing in the nature of the Supreme Court of Hawaii which makes it an unfit tribunal for the final determination of actions in admiralty. If while Hawaii was a republic and even during the period after its annexation, but before the territorial act went into effect, the territorial courts were proper courts for the final decision of admiralty cases, there is no warrant either in the organic act or out of it for the belief that they immediately became unfit. And the statute is not rendered less inharmonious by the solution which is offered by those seeking this appeal. They get their appeal, but the appeal involves an inconsistency at least as great as that involved in the refusal of it. A defeated litigant has no inalienable right to carry his lost cause to two successive appellate tribunals; and a court would be little

inclined to give him that right when other parties similarly situated have only one appeal. The losing party in an admiralty cause in the District Court under the new regime will have but one appellate court to which he can take his case. The appellant here has already had a hearing before one appellate tribunal. There is no reason in the nature of things why he should have another. On the contrary, there is every reason in logic and common sense for allowing this case to follow with its associates on the dockets of the Hawaiian courts at the time the organic act went into effect, the orderly course to final determination which it would have followed if the act had never been passed.

Whether, however, we are to construe Sections 10 and 81 of the organic act as providing that, as regards pending actions there shall be no appeals in any case beyond the Supreme Court of the territory; or as providing merely that they may be prosecuted to judgment there, and that there shall then be such further appeal as the act allows, our conclusion must be the same. For under Section 86 the appeals allowed by the act are given in those cases only in which the Supreme Court of the United States can exercise appellate jurisdiction over the Supreme Court of a state. The case involved here, is not such a case; and since the statute gives no appeal, no consideration of convenience can overcome its effect. We submit that this is not a case for the exercise of the appellate jurisdiction of the Circuit Court of Appeals.

## III.

**No appeal lay in any event to the Circuit Court of Appeals for the Ninth Circuit at the time when notice of appeal was given after the final decree of the Hawaiian Court. At that time Hawaii had not been assigned by this Court to that Circuit.**

This point of our argument is intended to apply solely to the lack of jurisdiction which existed at the time when the petitioner attempted to take an appeal by action before the Hawaiian court. The present application is not for a writ commanding the Circuit Court of Appeals to allow an appeal, but commanding it to set aside its order refusing to allow such appeal and to proceed to "hear and decide" the cause "on its merits" (Pet. for Writ, p. 12). Consequently, if the proceedings in the Hawaiian court relied upon as accomplishing an appeal did not in fact create an appeal, the writ applied for must be denied. Nothing can be clearer than the proposition that there must be a right and duty in the court claimed to be the appellate court to hear and decide, and that this right and duty must exist at the time at which the initial proceedings on appeal are taken. When the notice of appeal was given in the case at bar and other action taken intending an appeal to the Circuit Court of Appeals for the Ninth Circuit, that court was not an appellate court as to any suits then depending in the Supreme Court of Hawaii. This Court, to which Congress had delegated its own power of assigning territories to the various circuits for the purpose of hearings on appeal from territorial courts, had not then acted with reference to Hawaii. Its failure to act in this regard was, legally, a failure on the part of Congress to provide an appellate jurisdiction for that territory. The subsequent action of this

Court could have no greater effect than a subsequent Act of Congress giving a right of appeal. Such right would be operative from the date of the new act, but it would not validate an appeal attempted to be taken before the act gave the right to appeal. It is the familiar doctrine of this Court that the right of appeal is a statutory one. It does not exist unless it is conferred. Indeed, in the case already cited, *McNulty* vs. *Batta*, 10 How. 71, the right may be taken away from this Court to proceed to judgment upon an appeal perfected and actually pending before it. If then, the proceedings before the Supreme Court at Hawaii did not create an appeal because at that time there was no appellate court, the subsequent action of this Court in assigning Hawaii to the Ninth Circuit was not retroactive in its effect. It had force only as to appeals thereafter to be taken.

The Circuit Courts of Appeals of the nine circuits do not constitute a single court. In the absence of the assignment by this Court of Hawaii to the Ninth Circuit, there was no more right in the petitioner to select it as an appellate court than there was to select the Circuit Court of Appeals for the first, or any other circuit.

We have purposely confined our argument on this point to the effect of the proceedings shown by the petition to have been taken at Hawaii. It is our understanding that when similar proceedings were sought to be taken before the Circuit Court of Appeals of the Ninth Circuit, the petitioner had already (though after the Hawaiian Court had denied the appeal) applied to this Court for an assignment of the Territory. On the hearing before the Circuit Court of Appeals it was suggested by the petitioner that a continuance might be proper until this Court should act.

It was agreed, then, that the hearing should proceed, and that such action as this Court might take regarding the assignment should be deemed as having been taken before the hearing referred to. Whatever legal effect may be attributed to this understanding, whatever right may have accrued to the petitioner if the assignment had been made by this Court prior to the hearing in the Court of Appeals (it being remembered, however, that such assignment was not applied for until after the "perfecting of the appeal" in the Hawaiian Court), we desire that the benefit of the understanding or right should be preserved to the petitioner.

## IV.

**The determination by the Circuit Court of Appeals of the Ninth Circuit that it had no jurisdiction of this appeal was a judicial determination which cannot be reviewed by mandamus.**

While mandamus will lie to compel a court to hear and determine a case properly within its jurisdiction, it will not lie to compel the court to determine in a particular way, any of the questions involved in that case.

*In re Nininger*, 150 U. S. 150;
*American etc. Co.* vs. *Jacksonville etc. Ry. Co.*, 148 U. S. 372;
*Ex parte Brown*, 116 U. S. 401;
*Ex parte Newman*, 14 Wall. 152.

If the Circuit Court of Appeals had refused the petitioner in this case any hearing whatever it might doubtless have been compelled by mandamus to grant the hearing. But that is the full extent to which the writ could go. If the court had then given the matter judicial consideration and after full examination of the statutes involved had deter-

mined that those statutes when properly construed gave the petitioner no right of appeal, and had accordingly dismissed the appeal, mandamus would not lie to review that decision. Yet that is precisely what the Circuit Court of Appeals for the Ninth Circuit has done. The petitioner has submitted the question of its right of appeal to the court. The court has accorded a hearing, and after consideration has determined judicially that the appeal will not lie at all. This decision may possibly be reviewed by *certiorari*, but to review it by mandamus it seems to us would be to compel the court to decide a judicial question in a particular way.

The petitioner, believing that it had a right to appeal to the Circuit Court of Appeals, and that the proceedings taken by it in the Supreme Court of Hawaii were not sufficient to perfect that appeal, might have applied to any judge of the Circuit Court of Appeals for the Ninth Circuit for the allowance of an appeal. If these judges had all in turn refused to perform what is perhaps the merely ministerial act of allowing the appeal, they could doubtless be compelled by mandamus, if the right to appeal exists, to allow the appeal. The petitioner, however, goes before the court itself and asks for a judicial determination of its right. The court grants the hearing and gives the matter consideration and makes its determination. It surely has the power to determine, in the first instance, at any rate, the limits of its own jurisdiction, and in doing so it exercises one of the first prerogatives of every court. Such determination is in the highest sense a judicial determination. Can it be compelled by mandamus to reach the opposite conclusion?

Nor do we think the case of *Ex parte Parker*, 131 U. S. 221, relied on by petitioner, is at variance with our conten-

tion. The appeal there ordered to be reinstated was one which had been taken to the Supreme Court of a territory, "but dismissed for alleged irregularities in taking it". A different method of reviewing the decision of a Circuit Court of Appeals in a similar case is illustrated by the much more recent case of

*Mutual Life Ins. Co.* vs. *Phinney*, 178 U. S. 327,

in which the aggrieved party obtained full relief by *certiorari*. But in any event the action of a court in dismissing an appeal for "*alleged irregularity in taking it*", presents a very different case from its action in dismissing it on the grounds that in such cases *the statutes have conferred upon it no appellate jurisdiction whatever*. It has been repeatedly held that the decision of a Circuit or District Court on a plea to its jurisdiction is not to be reviewed by mandamus. We can see no difference between such a case and the case presented here.

*In re Lehigh etc. Co.*, 156 U. S. 322;
*Morrison* vs. *District Court*, 147 U. S. 14;
*Ex parte Baltimore etc. R. R. Co.*, 108 U. S. 566.

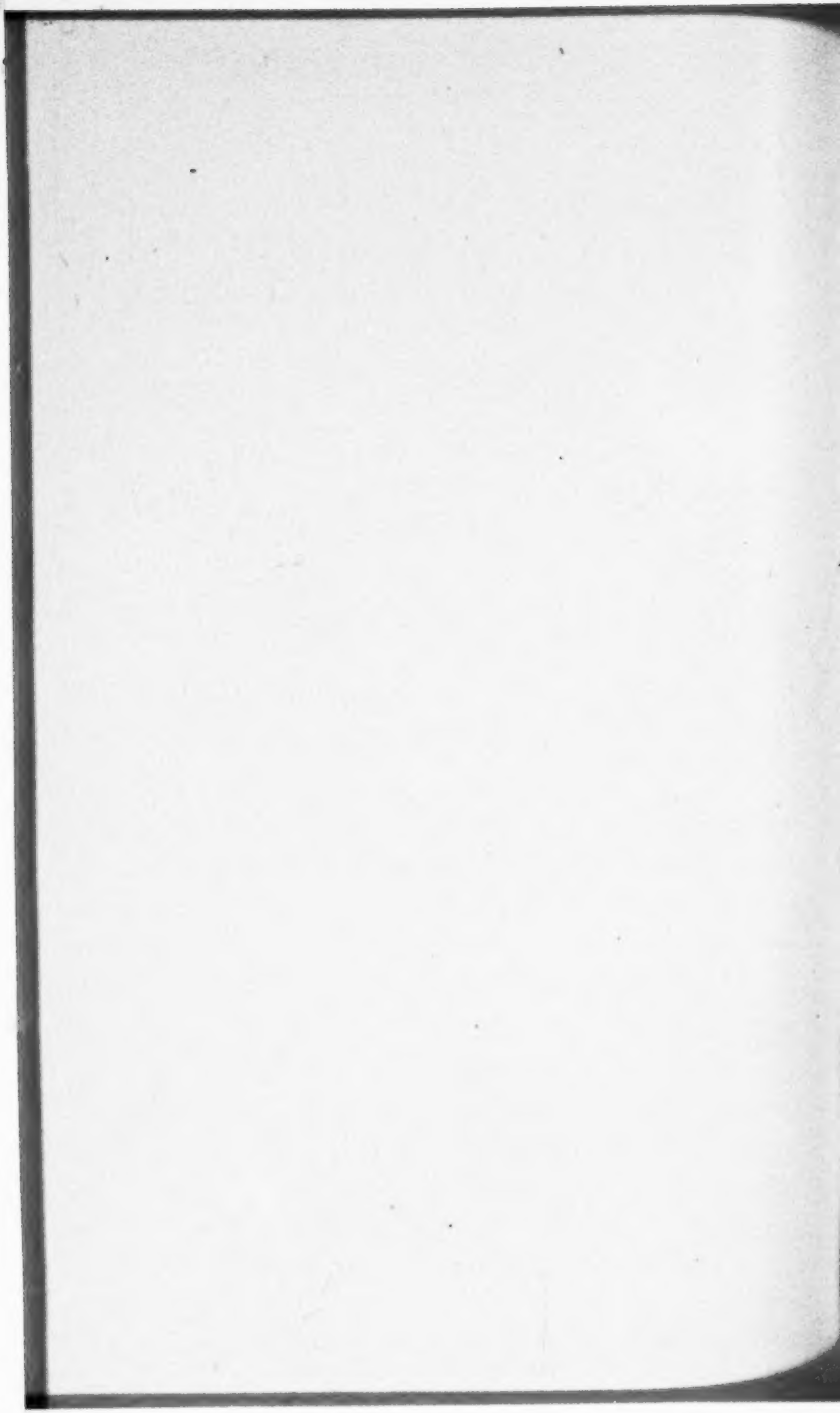
The various Circuit Courts of Appeal have been called upon many times since that court was established to define the limits of its jurisdiction. We do not, however, find any reported case in which it has been sought to control their determination of that question by mandamus from this Court.

> "It may be said generally, that, where the court, acting in a judicial capacity, has dismissed an appeal from an inferior tribunal, its order of dismissal is regarded as a judicial determination of the question, and, however erroneous, it is final and conclusive, and its correctness will not be questioned by mandamus."
> *High, Extraordinary Legal Remedies*, Sec. 191;
> *Ex parte Newman*, 14 Wall. 152.

For the various reasons given in the foregoing brief, we submit that the application for a writ of mandamus should be denied.

Respectfully submitted,

CHARLES PAGE,
EDWARD J. MCCUTCHEN,
C. H. LINDLEY,
HENRY EICKHOFF,
PAUL NEUMANN,
Attorneys for Hind *et al.*



IN THE

# Supreme Court of the United States.

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|---|---|
| In the Matter of the Petition of the WILDER'S S. S. COMPANY, For Writ of Mandamus. | No. 18, Original. |

## Return of the United States Circuit Court of Appeals for the Ninth Circuit to order to show cause.

The return of the United States Circuit Court of Appeals for the Ninth Circuit and of William B. Gilbert, Erskine M. Ross and W. W. Morrow, the judges of said Court, to the order of this Honorable Court requiring them to show cause why a writ of mandate should not issue in the above entitled cause, respectfully presents to the Court:

1. That the matters and things set out in the petition on file herein duly came before the said Circuit Court of Appeals for adjudication as to whether or not the said Court had jurisdiction to entertain an appeal in the cause in the petition referred to from the final judgment of the Supreme Court of Hawaii and that the right of the said petitioner to appeal in the matter mentioned to the said Court and to have the same heard by it, was judicially determined by

said Court, and a final order made thereon denying that it had such jurisdiction.

2. That from the matters and things in said petition set forth, it appeared and does appear that the said Circuit Court of Appeals did not have jurisdiction of the said cause on appeal.

3. That the said Circuit Court of Appeals did not and does not have jurisdiction on appeal in admiralty cases from the Supreme Court of the Territory of Hawaii, which cases were pending in said Court at the date when the Act of Congress of April 30, 1900 went into effect.

4. That the said Circuit Court of Appeals properly decided on the facts set out in the said petition that said Court had no jurisdiction to proceed in the said matter and that its decision and order in the said matter constituted a final judgment therein which is properly subject to review by this Honorable Court by writ of certiorari.

WHEREFORE, the respondents, the said Circuit Court of Appeals for the Ninth Circuit and the Judges of said Court, pray that the matters aforesaid be determined according as to law and justice may appertain.

For the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

WM. W. MORROW,
Resident Circuit Judge.

Seal
Attest
F. D. Monckton

# Supreme Court of the United States.

No. 9, Original.—October Term, 1901.

The Wilder's Steamship Company, petitioner. } Petition for mandamus.

This was a petition by the Wilder's Steamship Company, a corporation organized and existing under the laws of the Territory of Hawaii, for a writ of mandamus to the United States Circuit Court of Appeals for the Ninth Circuit to entertain an appeal from the Supreme Court of the Territory of Hawaii.

On December 27, 1899, the steamer Claudine, one of the petitioner's steamships, came into collision with the barkentine William Carson. On February 5, 1900, the owners of the William Carson and of her cargo filed a libel in admiralty against the steamship company in the circuit court of the first judicial circuit of the Republic of Hawaii. On May 7, 1900, that court rendered a decree against the steamship company in the sum of $55,000, upon the ground that the collision was caused by the fault of the steamship company, with no fault or negligence on the part of those in charge of the William Carson. From that decree an appeal was taken to the Supreme Court of the Republic of Hawaii, as provided by the then existing law of the Republic. On November 9, 1900, the cause having come on regularly to be heard before the Supreme Court of the Territory of Hawaii, the decree was affirmed by that court. On the same day, an appeal was claimed from that court to the United States Circuit Court of Appeals for the Ninth Circuit, but was denied, for want of jurisdiction, by the Supreme Court of the Territory on November 7, 1900, and by the Circuit Court of Appeals on April 1, 1901. 13 Hawaii, 174; 108 Fed. Rep. 113.

On March 5, 1901, the steamship company presented to this court a petition praying that an order, under section 15 of the act of March 3, 1891, c. 517, assigning the Territory of Hawaii to the Ninth Circuit, might be made *nunc pro tunc* as of June 15, 1900, the date at which the act of Congress of April 30, 1900, c. 339, entitled "An Act to provide a government for the Territory of Hawaii," took effect.

On April 12, 1901, the petitioner filed in this court a petition praying for a similar order, and further praying that a writ of mandamus might issue to the United States Circuit Court of Appeals for the Ninth Circuit to set aside its order denying the appeal, and to entertain the cause.

On April 15, 1901, this court "ordered that the Territory of Hawaii be, and it is hereby, assigned to the Ninth Judicial Circuit under section

15 of the Judiciary Act of March 3, 1891;" gave leave to file this petition for a writ of mandamus; and awarded a rule to show cause, returnable on May 13.

On May 3, after that order, the petitioner presented to the Circuit Court of Appeals for the Ninth Circuit another petition for the allowance of an appeal from the decree of the Supreme Court of the Territory of Hawaii; and that petition was denied.

On May 13, the Circuit Court of Appeals for the Ninth Circuit made a return, that upon the facts stated in the petition it had not jurisdiction of the appeal: that the question whether it had such jurisdiction came before it for adjudication and was judicially determined; and that its decision in the matter constituted a final judgment, properly subject to review in this court by writ of certiorari.

The case was submitted to this court upon the petition for a mandamus, the return thereto, and a motion of the petitioner to file in evidence its petition of May 3 to the Circuit Court of Appeals and the disallowance thereof.

The Republic of Hawaii, before its annexation to the United States, had a fully organized government. The judicial system consisted of courts of original and appellate jurisdiction, whose powers were defined by the constitution and statutes of the Republic. The circuit courts were the courts of general original jurisdiction, and had power to determine all civil causes in admiralty. In such causes, as well as in other cases, the Supreme Court had appellate jurisdiction, and its decrees, by express provision of the constitution, were made "final and conclusive." Constitution of Hawaii, arts. 82–86. Ballou's Civil Laws of Hawaii, 1897, §§ 1105, 1136, 1144, 1145, 1164, 1430, 1433, 1434.

By the Joint Resolution of the Congress of the United States of July 7, 1898, c. 55, the Hawaiian Islands were annexed to the United States, and it was provided that "until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies thus occasioned;" and that "the municipal legislation of the Hawaiian Islands," "not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." 30 Stat. 750.

On July 8, 1898, "in the exercise of the power thus conferred upon him by the Joint Resolution, the President hereby directs that the civil, judicial and military powers in question shall be exercised by the officers of the

Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies." Letter of Secretary of State to Minister Sewall; Report 305, H. R. 56th Congr. 1st sess. p. 3.

On August 12, 1898, the sovereignty of the Hawaiian Islands was transferred to the United States. The act of Congress of April 30, 1900, c. 339, entitled "An Act to provide a government for the Territory of Hawaii," which by its terms took effect June 15, 1890, declared in § 1 that the phrase "the laws of Hawaii," as therein used, should mean the constitution and laws of the Republic of Hawaii in force at the date of that transfer; and in § 2 that the islands so acquired should be known as the Territory of Hawaii; and contained the following provisions:

"SEC. 5. The Constitution and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the new Territory as elsewhere in the United States."

"SEC. 6. The laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall remain in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

Section 7 repealed the constitution and various laws of the Republic of Hawaii, including those on maritime matters. 31 Stat. 141, 142.

"SEC. 10. All rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed." "All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii." 31 Stat. 143.

"SEC. 81. The judicial powers of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the local courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

"SEC. 83. The laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature." 31 Stat. 157.

"SEC. 86. There shall be established in said Territory a District Court to consist of one judge, who shall reside therein and be called the District Judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney and a marshal of the United States for the said district, and said judge, attorney and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizable in a Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court; and said judge, district attorney and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys and marshals of District and Circuit Courts of the United States. Writs of error and appeals from said District Court shall be had and allowed to the Circuit Court of Appeals in the Ninth Judicial Circuit in the same manner as writs of error and appeals are allowed from Circuit Courts to Circuit Courts of Appeals as provided by law; and the laws of the United States relating to juries and jury trials shall be applicable to said District Court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." 31 Stat. 158.

[January 6, 1902.]

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the Court.

We are of opinion that the appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit was rightly disallowed.

The libel in admiralty was originally brought, and a decree made, in a court of the Republic of Hawaii having jurisdiction of the cause, and an appeal from that decree was duly taken to the Supreme Court of Hawaii, as provided by the then existing law of the Republic. While the appeal was lawfully pending in the courts of Hawaii, Congress, by the act of April 30, 1900, c. 339, provided a government for the Territory of Hawaii, establishing therein a Supreme Court and other courts, and enacting, in section 10, that "all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." This appeal in admiralty was one of the "other pro-

ceedings" then pending in the courts of the Republic of Hawaii, which were "to be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." On November 9, 1900, the cause having come on regularly to be heard before the Supreme Court of the Territory, in accordance with the act of Congress, the decree below was affirmed; and on the same day an appeal from the decree of affirmance was claimed to the United States Circuit Court of Appeals for the Ninth Circuit.

The act of Congress of 1900 contains no provision authorizing such an appeal. The petitioner refers to section 86 of that act, which established in the Territory a District Court of the United States with the powers of a Circuit Court of the United States. But that court is given no appellate urisdiction. The provision allowing writs of error and appeals from that court to the Circuit Court of Appeals for the Ninth Judicial Circuit does not touch appeals from the Supreme Court of the Territory of Hawaii. And the remaining clause as to appeals, writs of error, removals of causes and other matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii provides that they shall be governed, not by the laws applicable to other Territories, but by the laws of the United States as to such matters and proceedings "as between the courts of the United States and the courts of the several States." Congress may have considered that, owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that Territory should be more restricted than over other Territories, and should extend only, as in the case of the several States, to judgments against a right claimed under the Constitution, laws or treaties of the United States. But whatever may have been the reasons which influenced Congress, its language is too plain to be misunderstood. Cases in admiralty, brought after the act of 1900 took effect, must of course be brought in the District Court of the United States, and subject to the right of appeal therein provided to the Circuit Court of Appeals for the Ninth Circuit. But as to cases in admiralty pending in the courts of Hawaii when the act took effect, there is no special provision, and they therefore remain, like other civil cases, to be finally determined in the courts of the Territory of Hawaii, under the general provision of section 10. In cases in admiralty, as in all other cases pending in the courts of Hawaii at that time, it was within the discretionary power of Congress to provide that they should remain within the jurisdiction and determination of the courts of the Territory; and it has clearly so provided as to pending suits of all classes. The fact that in a State cases in admiralty cannot be brought in its courts, but only in the courts of the United States, affords no reason for implying that Congress, without any language expressing such an intention, meant to vest in any

court of the United States either original or appellate jurisdiction in cases in admiralty pending in the courts of Hawaii when this act of Congress took effect.

Reliance is placed by the petitioner on section 15 of the act of March 3, 1891, c. 517, (long before the annexation of Hawaii,) establishing Circuit Courts of Appeals, which provides that "the Circuit Court of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this act," (which include cases in admiralty,) "shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders and decrees of the District Court and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits." 26 Stat. 830. But on November 9, 1900, when this appeal to the Circuit Court of Appeals for the Ninth Circuit was claimed from the Supreme Court of the Territory of Hawaii, as well as on April 12, 1901, when this petition for a writ of mandamus was filed, this court had made no order assigning the Territory of Hawaii to any judicial circuit. The order made by this court on April 15, 1901, assigning the Territory of Hawaii to the Ninth Judicial Circuit, was not, as this petitioner requested, made as of a former day, but took effect only from its date. And no order of this court, assigning the Territory of Hawaii to a judicial circuit under the act of 1891, can give a right of appeal inconsistent with the provision of section 86 of the later act of 1900 restricting such appeals to cases in which by the laws of the United States they are allowable to the courts of the United States from the courts of the several States.

*Petition dismissed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*